

No. 11342

*W. 2446*  
United States

*at 1  
not available*  
Circuit Court of Appeals

For the Ninth Circuit.

POLSON LOGGING COMPANY, a corporation,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

Transcript of Record

In Three Volumes

VOLUME II

Pages 235 to 528

Upon Appeal from the District Court of the United States  
for the Western District of Washington  
Southern Division

FILED

OCT 1 - 1946

PAUL P. O'BRIEN,



No. 11342

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United States  
Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Polson Logging Company, a Corporation.

United States Circuit Court of Appeals  
For the Ninth Circuit

POLSON LOGGING CO.,

vs.

UNITED STATES OF AMERICA,  
MANDATE

United States of America—ss.

The President of the United States of America:  
To the Honorable the Judges of the District Court  
of the United States for the Western District of  
Washington, Southern Division, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Washington, Southern Division, before you, or some of you, in a cause between United States of America, petitioner, and Polson Logging Company, a corporation, et al., respondents, No. 323, a judgment on declaration of taking was duly filed on the 23rd day of May, 1944, which said judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Polson Logging Company, a corporation, as appellant, against United States of America, as



appellee, agreeable to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 23rd day of April in the year of our Lord One Thousand Nine Hundred and Forty-Five the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and upon motion of appellee to dismiss appeal herein, and was duly [1\*] submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is, dismissed. (June 6, 1945.)

You, Therefore, Are Hereby Commanded that such further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 26th day of June, in the year of our Lord One Thousand Nine Hundred and Forty-Five and of the Independence of the United States of America the One Hundred and Sixty-Ninth.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

Let the within Mandate be entered this 29th day of June, 1945.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Approved June 29, 1945.

ANTHONY L. STELLA,  
Special Atty., Lands Division,  
Dept. of Justice.

Approved, June 29, 1945.

METZGER, BLAIR &

GARDNER,

F. D. METZGER,

By A. E. BLAIR,

Attorneys for Polson Logging  
Co.

[Endorsed]: Filed June 29, 1945. [2]

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## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 29th day of June, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

No. 323

UNITED STATES OF AMERICA,

Petitioner,

vs.

POLSON LOGGING CO., a Corp., et al.,

Respondent.

Now on this 29th day of June, 1945, in the above matter, the clerk presents mandate dismissing appeal of appellant, which is signed by the court and filed. [3]

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October 22, 1943.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I have this day received from the Department of Agriculture Check No. 11,286 in the amount of Six Hundred Eighty-Eight (\$688.00) Dollars remaining estimated sum of total estimated just compensation of \$8,969.00 of which \$8,280.00 heretofore has been deposited for the acquisition of fee simple title over and across certain parcels of land in Grays Harbor County designated as Tracts 1, 2 and 3, United States of America, Petitioner, vs. Polson Logging Company, a corporation, et al., Respondents. Cause 323.

I further certify that I have this day deposited the aforesaid moneys in the Registry of this Court.

Witness my hand and official seal at Tacoma, Washington, this 22d day of Oct., 1943.

[Seal]                    JUDSON W. SHORETT,  
   Clerk.

By /s/ E. REDMAYNE,  
   Deputy. [4]

---

### RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 8th day of Sept., 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 8th day of September, 1945, this cause comes on before the court for hearing on application for leave for jury to view premises in above cause. Mr. Metzger addresses the court re application. The court now denies application and exception allowed the defendant. The court now orders that a presentation of all legal issues and argument on same that are preliminary to the trial shall be heard on Wednesday, September 19 at 10 a.m. [5]

## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 18th day of September, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 18th day of September, 1945, the above cause comes on for hearing on motion of the government to Amend Declaration of Taking. A. L. Stella and Aileen Hogshire, Spec. Attys., Dept. of Justice, represent the government. F. D. Metzger and A. E. Blair represent the respondent. Argument on motion by Mr. Stella. Argument opposing motion by Mr. Metzger. Further argument by Mrs. Hogshire. The court now grants the motion to amend, said amendment not to include new lands, but to correct description of lands as taken by Declaration of Taking. Trial date of September 20 is now vacated on the court's own motion and cause to be placed on assignment calendar on September 24. The court states that a hearing on all law matters pertaining to the above cause will be had on Thursday, September 20 at 2 p. m.

[Title of District Court and Cause.]

MOTION FOR AN ORDER TO AMEND DECLARATION OF TAKING AND SUBSEQUENT PLEADINGS

Comes Now the petitioner, United States of America, by its undersigned attorneys and moves the Court for an order amending the declaration of taking filed November 12, 1943, and all pleadings subsequent thereto, to correct the description of that portion of the land described therein and designated line "F" set forth on page 9 of said declaration of taking as follows:

1. By inserting on line 17 of page 9 of said declaration of taking after the second course "thence N. 83° 30' E. 240 feet" the course "thence N. 89° 40' E. 300 feet";

2. By substituting for the description of line "F" the following description:

Line "F" is land 100 feet in width, extending 50 feet on each side of the center line, being 1.21 miles in length and containing 14.7 acres, more or less, described as follows: Beginning at Station 339/25 of U. S. Highway Number 101, said point being west 289 feet and south 4.6 feet from the northeast corner of Section 11, Township 21 North, Range 10 West of the Willamette Meridian, and running thence S. 73° 35' E. 290 feet; thence N. 83° 30' E. 240 feet; thence N. 89° 40' E. 300 feet; thence S. 83° 55' E. 560 feet; thence N. 72° 15'

E. 140 feet; thence N.  $52^{\circ} 24'$  E. 200 feet; thence N.  $57^{\circ} 31'$  E. 1360 feet; thence N.  $69^{\circ} 29'$  E. 240 feet; thence N.  $83^{\circ} 41'$  E. 200 feet; thence N.  $86^{\circ} 58'$  E. 700 feet; thence N.  $87^{\circ} 38'$  E. 730 feet; thence S.  $85^{\circ} 36'$  E. 200 feet (Station 51/60); thence S.  $76^{\circ} 06'$  E. 260 feet; thence S.  $49^{\circ} 25'$  E. 480 feet; thence S.  $52^{\circ} 49'$  E. 360 feet; thence S.  $74^{\circ} 06'$  E. 137.5 feet to the east line of Section 1, Township 21 North, Range 10 West of the Willamette Meridian;

in all pleadings filed subsequent to said declaration of taking. [7]

This motion is based on the affidavit of Anthony L. Stella attached hereto and upon the files and records herein.

UNITED STATES OF  
AMERICA,

By F. P. KEENAN,

Special Assistant to the At-  
torney General.

ANTHONY L. STELLA,

Special Attorney, Department  
of Justice.

(Acknowledgment of Service.)

State of Washington,  
County of Pierce—ss.

Anthony L. Stella, being first duly sworn on oath deposes and says that he is a Special Attorney in the Department of Justice and one of the attorneys



for petitioner and as such makes this affidavit in support of petitioner's motion for an order amending the declaration of taking filed herein on November 12, 1943, and all subsequent pleadings to correct the description of the property designated line "F"; that through inadvertance the third course "thence N. 89° 40' E. 300 feet" was omitted in the description of line "F" on line 17 of page 9 following the course "thence N. 83° 30' E. 240 feet"; that in order to correct the description, it is necessary and proper that an order be entered correcting the declaration of taking and all subsequent pleadings as requested in petitioner's motion; that the description of line "F" as corrected by the insertion of the third course "thence N. 89° 40' E. 300 feet" after the second course "thence N. 83° 30' E. 240 feet" on line 17 of page 9 of said declaration of taking and the description of line "F" so corrected in all subsequent pleadings is the identical property which was purported to be described as line "F" in said declaration of taking and delineated on the plat annexed to said declaration of taking identified as Schedule "A".

ANTHONY L. STELLA.

Subscribed and sworn to before me this 18th day of September, 1945.

[Seal]     /s/ LEO A. McGOVICK,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

[Endorsed]: Filed Sept. 18, 1945. [9]



## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 20th day of September, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 20th day of September, 1945, this cause comes on for hearing on matters of law. A. L. Stella and Nona Cox, Spec. Attys., Dept. of Justice, represent the government and F. D. Metzger represents the respondent. Order amending declaration of taking and subsequent pleadings signed by the court and filed. Exceptions of respondent Polson Logging Company to order amending Declaration of Taking and subsequent pleadings allowed respondent and signed by the court and filed. Argument on respondent's motion to dismiss declaration of taking by Mr. Metzger. Argument by Mrs. Cox. Rebuttal argument by Mr. Metzger. The court now denies respondent's motion to dismiss and exception allowed. [10]

[Title of District Court and Cause.]

ORDER AMENDING DECLARATION OF  
TAKING AND SUBSEQUENT PLEADINGS

This Matter having come on regularly for hearing upon motion of the petitioner, United States of America, appearing through Anthony L. Stella, Special Attorney, Department of Justice, for an order amending the declaration of taking filed November 12, 1943, and all pleadings subsequent thereto including the second amended petition in condemnation; Metzger, Blair and Gardner appearing for the respondent Polson Logging Company; and it appearing that through inadvertence the third course was omitted from the description of line "F" in said declaration of taking and all subsequent pleadings including the second amended petition in condemnation; the Court having considered said motion and the affidavit of Anthony L. Stella in support thereof and the records and files herein and being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered:

1. That the declaration of taking filed November 12, 1943, be and it is hereby amended by inserting in the description of line "F" after the second course "thence N. 83° 30' E. 240 feet" on line 17 of page 9 of said declaration of taking the course "thence N. 89° 40' E. 300 feet"; and

2. That all pleadings filed subsequent to said declaration of taking, including the second amended petition in condemnation, be and they are hereby

amended by [11] substituting for the description of line "F" the following description:

Line "F" is land 100 feet in width, extending 50 feet on each side of the center line, being 1.21 miles in length and containing 14.7 acres more or less, described as follows: Beginning at Station 339/25 of U. S. Highway Number 101, said point being west 289 feet and south 4.6 feet from the northeast corner of Section 11, Township 21 North, Range 10 West of the Willamette Meridian, and running thence S. 73° 35' E. 290 feet; thence N. 83° 30' E. 240 feet; thence N. 89° 40' E. 300 feet; thence S. 83° 55' E. 560 feet; thence N. 72° 15' E. 140 feet; thence N. 52° 24' E. 200 feet; thence N. 57° 31' E. 1360 feet; thence N. 69° 29' E. 240 feet; thence N. 83° 41' E. 200 feet; thence N. 86° 58' E. 700 feet; thence N. 87° 38' E. 730 feet; thence S. 85° 36' E. 200 feet (Station 51/60); thence S. 76° 06' E. 260 feet; thence S. 49° 25' E. 480 feet; thence S. 52° 49' E. 360 feet; thence S. 74° 06' E. 137.5 feet to the east line of Section 1, Township 21 North, Range 10 West of the Willamette Meridian.

Done in Open Court this 20th day of September, 1945.

CHARLES H. LEAVY,  
United States District Judge.

Presented by:

ANTHONY L. STELLA,  
Special Attorney, Department  
of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Sept. 20, 1945. [12]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANT POLSON  
LOGGING COMPANY TO ORDER AMEND-  
ING DECLARATION OF TAKING AND  
SUBSEQUENT PLEADINGS

Comes now the defendant Polson Logging Company, a corporation, and excepts to the order of the Court amending the declaration of taking filed herein November 12, 1943, and all subsequent pleadings, as follows:

(1) The recital therein, namely, "it appearing that through inadvertence the third course was omitted from the description of line "F" in said declaration of taking and all subsequent pleadings including the second amended petition in condemnation," is unwarranted by any evidence before the Court and without foundation in fact.

(2) The Court is without jurisdiction or authority to amend the declaration of taking signed by Paul H. Appleby, Under Secretary of Agriculture, November 2, 1943, and filed herein November 12, 1943, because said declaration of taking is an independent and non-judicial act of an administrative officer of the United States and, if amendable at all, amendable solely by the administrative officer of the United States who made the same in the first instance.

(3) That said order is violative of the constitutional rights of this defendant in that it results in the taking of property of this defendant without

authority of law and [13] in violation of the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States.

(4) The Court being without jurisdiction or authority to amend said declaration of taking, the amendment of all pleadings filed subsequently thereto is without foundation in fact and unwarranted in law.

Dated September 20, 1945.

L. B. DONLEY,

F. D. METZGER,

METZGER, BLAIR &

GARDNER,

Attorneys for Defendant

Polson Logging Company.

The foregoing Exceptions were separately presented and taken at the time of presentation of the order to which they relate, and they are, and each of them is, hereby allowed.

Done in Open Court this 20th day of September, 1945.

/s/ CHARLES H. LEAVY,

District Judge.

[Endorsed]: Filed Sept. 20, 1945. [14]

[Title of District Court and Cause.]

MOTION TO QUASH AND ADJUDGE NULL  
AND VOID THE DECLARATION OF TAK-  
ING FILED HEREIN NOV. 12, 1943, AND  
TO VACATE JUDGMENT ENTERED  
THEREON MAY 23, 1944

Comes now defendant Polson Logging Company,  
a corporation, by L. B. Donley and Metzger, Blair  
& Gardner, its attorneys, and,

I.

Renews its challenge to the sufficiency, effective-  
ness and validity of the Declaration of Taking,  
executed by Paul H. Appleby, as Under-Secretary  
of Agriculture of the United States, November 2,  
1943, and filed herein November 12, 1943, and moves  
the Court to quash and set aside said Declaration  
of Taking or otherwise adjudge the same null and  
void and of no effect.

II.

Moves to quash, vacate, set aside or otherwise  
adjudge null and void that certain judgment en-  
titled "Judgment on Declaration of Taking,"  
entered in this court and cause May 23, 1944.

The foregoing challenge and motions are made  
upon the following grounds:

1. That the said Paul H. Appleby, as Under-  
Secretary of Agriculture of the United States, is  
wholly unauthorized to acquire for and on behalf  
of the United States the real estate described in  
said Declaration of Taking or any real estate what-



soever, or to make and execute a Declaration of [15] Taking provided for by Section 1 of Chapter 307 of the Act of Congress approved February 6, 1931, (46 Statutes, 1421; 40 U.S.C., Section 258a).

2. That said Declaration of Taking wholly fails to show that the said Paul H. Appleby, as Under-Secretary of Agriculture of the United States, or any other officer of the Department of Agriculture of the United States, was or is authorized by law to acquire the real estate described in said Declaration.

3. That said Declaration of Taking was and is a nullity and void because the acts or instruments of authorization therein specified and relied on do not, either as a matter of fact or as a matter of law, authorize the acquisition by the Under-Secretary of Agriculture of the United States, or by any other officer of the United States, of the real estate described in said Declaration of Taking.

4. That in making and entering said Judgment, this Court acted without authority of law and in excess of its jurisdiction.

5. That said Declaration of Taking and said Judgment thereon, in so far as they together or either of them standing alone purports to or is effective to vest in the United States title to the real estate described therein, constitute a taking of the property of this defendant without due process of law and are, and each of them is, repugnant to and violative of the due process and eminent do-

main clauses of the Fifth Amendment to the Constitution of the United States and the Ninth Amendment to the Constitution of the State of Washington.

L. B. DONLEY,  
METZGER, BLAIR &  
GARDNER,  
F. D. METZGER,  
Attorneys for Defendant,  
Polson Logging Company.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 20, 1945. [16]

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## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 24th day of September, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 24th day of September, 1945, the Court calls the assignment calendar and the following cases are set for trial:

\* \* \* \*

Cause No. 323 set for trial on November 12, 1945.



A. L. Stella, Spec. Atty., Dept. of Justice, represents the government and F. D. Metzger represents the defendant. Order fixing date as of which property is to be valued signed by the court and filed. Order presented by Mr. Metzger. Plaintiff and defendant exceptions to above order signed by the Court and filed. [17]

---

[Title of District Court and Cause.]

ORDER FIXING DATE AS OF WHICH  
PROPERTY IS TO BE VALUED

This cause having come on for pre-trial hearing upon the application of Anthony L. Stella, Special Attorney, Department of Justice, United States of America, for an order fixing the date as of which the value of or the just compensation to be paid for the property taken or sought to be taken shall be determined, F. D. Metzger and A. E. Blair of Metzger, Blair & Gardner appearing for the defendant, Polson Logging Company, and the Court having considered said application and the arguments of counsel for the petitioner and for the defendant, Polson Logging Company, in respect thereto, and being advised in the premises,

Doth Now Order that for the purpose of the determination of the just compensation to be paid, the value of the property taken or sought to be taken shall be determined as of October 22, 1943, but that in determining such value, the value of

the improvements, if any, made by the petitioner to or upon the property taken or sought to be taken between February 5, 1942, and October 22, 1943, shall be excluded.

Done in Open Court this 24th day of September, 1945.

CHARLES H. LEAVY,

Judge.

Presented by:

/s/ F. D. METZGER. [18]

Petitioner duly excepted to the foregoing order in so far as it fixes the date of valuation as October 22, 1943, instead of February 5, 1942.

Defendant, Polson Logging Company, duly excepted to the foregoing order in so far as it excludes from consideration in determining the just compensation the value of the improvements, if any, made by the petitioner between February 5, 1942, and October 22, 1943.

The foregoing exceptions are, and each of them is, hereby allowed.

Dated September 24, 1945.

CHARLES H. LEAVY,

Judge.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Sept. 24, 1945. [19]

## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 12th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 12th day of November, 1945, this cause comes on for trial to the court before a jury. F. P. Keenan and A. L. Stella, Spec. Attys. for the Dept. of Justice, represent the government and F. D. Metzger and A. E. Blair represent the respondent. Case is called. Both sides ready. Order denying respondent's motion to dismiss signed by the court and filed. Answer of Polson Logging Co., to second amended petition filed.

The clerk draws the names of 12 jurors. All jurors are sworn to answer questions. Jurors Irving Bertke, James Stewart, Gerhard Kirkebo, Fieldy Gleason, Halsey Scovell, Harold Mann excused for cause. The petitioner challenges Alexander Schermerhorn, Sidney McCoy and Earl Brassfield. Respondent challenges John Hoyt. The following jurors are sworn to try cause: Earl Brantner, Ellsworth Clow, Ora Murrey, Carl Gillette, Frank Thompson, Fred Gifford, Albert Weiss, Robert Lasley, Herman Olsen, Claude Christiansen, Harry Fellows, Neal Thorsen. [20]

The balance of the jurors are excused subject to call.

At 11:02 jurors are admonished and court is recessed 15 minutes. At 11:22 court is again in session. All jurors, counsel and parties present. Trial is commenced. Mr. Keenan makes oral motion that the burden of proof rests on the respondent. Motion denied and exception allowed. Opening statement by Mr. Keenan. Petitioner's Exhibit 1 admitted. Petitioner Witness J. M. Rands sworn and testifies. Petitioner Exhibit 2 admitted.

At 12 noon court recessed until 1:30 p.m.

At 1:30 court is again in session. All jurors, counsel and parties present. Trial is resumed. Petitioner Witnesses Lester Edge, Ward W. Gano and Earl Phillips sworn and testify. Petitioner Exhibits 3, 4, 5, 6, 7 and 8 marked for identification and offered. Objections to Exhibits 3 and 6 sustained and same are not admitted. Exhibits 4, 5, 7 and 8 admitted.

At 3:30 jurors are excused until 10 a.m. Tuesday. Remarks by all counsel and the court re benefits of condemnation. [21]

[Title of District Court and Cause.]

Order Denying Respondent, Polson Logging Company's, Motion to Dismiss, Strike and Demurrer to Petition in Condemnation Filed May 23, 1944, and Motion to Quash and Adjudge Null and Void Declaration of Taking Filed November 12, 1943, and Motion to Vacate Judgment on Declaration of Taking Entered May 23, 1944.

This Cause having come on for hearing on September 20, 1945, upon respondent, Polson Logging Company's Motion to Dismiss, Strike and Demurrer to Petition in Condemnation verified May 1, 1944, and filed herein May 23, 1944, and upon its Motion to Quash and Adjudge Null and Void the Declaration of Taking filed herein November 12, 1943, and to Vacate Judgment on the Declaration of Taking entered May 23, 1944, respondent appearing by F. D. Metzger of Metzger, Blair & Gardner, attorneys of record for said respondent, and petitioner appearing by Anthony L. Stella and Nona F. Cox, Special Attorneys, Department of Justice, the Court having heard the oral arguments on said motions and demurrer and deeming it proper to deny said motions and overrule said demurrer and being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That respondent's Motion to Dismiss and Strike the Second Amended Petition in Condemna-

tion verified May 1, 1944, and filed herein on May 23, 1944, be and the [22] same is hereby denied.

2. That respondent's demurrer to said Second Amended Petition be and the same is hereby overruled.

3. That respondent's Motion to Strike from said Second Amended Petition all references to those portions of land designated as Tracts 2 and 3 and Lines J and K, and that portion of Line B extending from Station 265/10 which is the beginning point of Line G to its terminus at the east Line of Section 11, Township 21 North, Range 9 West, W. M., be and the same is hereby denied.

4. That respondent's Motion to Quash, Adjudge Null and Void and Set Aside the Declaration of Taking filed herein November 12, 1943, and Motion to Vacate and Set Aside Judgment on said Declaration of Taking, entered thereon May 23, 1944, be and the same is hereby denied.

The respondent excepts to the foregoing order and said exception is allowed.

Done in Open Court this 12th day of November, 1945.

CHARLES H. LEAVY,  
United States District Judge.

Presented by:

ANTHONY L. STELLA,  
Special Attorney, Department  
of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Nov. 12, 1945. [23]



[Title of District Court and Cause.]

ANSWER OF POLSON LOGGING COMPANY  
TO SECOND AMENDED PETITION IN  
CONDEMNATION

Comes now defendant Polson Logging Company, a corporation, by its attorneys, L. B. Donley and Metzger, Blair & Gardner, and without waiving its Motion to Quash or otherwise Adjudge Void and of no Effect the Declaration of Taking filed herein November 12, 1943, and to Vacate, set aside and adjudge of no effect the Judgment on said Declaration of Taking entered May 23, 1944, and to dismiss the Second Amended Petition in Condemnation herein, but still insisting and relying upon said motions, and each of them, and alleges and shows to the Court that it is the owner in fee simple of all the lands described in Petitioner's Second Amended Petition in Condemnation, save and except so much of said lands as lie within Section 16, Township 21 North, Range 9 West of the Willamette Meridian, and that as to such of said lands as lie within said Section 16, it is the owner of an easement granted by the State of Washington therein and thereover for the use of said lands for the transportation and removal of logs and other forest or natural products, and for its answer to the Second Amended Petition in Condemnation, alleges as follows:

FIRST DEFENSE

That said Second Amended Petition in Condemnation fails [24] to state any authority for the

acquisition of the lands and real estate therein described or of any part of said lands, and fails to state any facts or authority for the institution and prosecution of a proceeding in eminent domain for the acquisition of said lands and real estate or any part thereof, or any facts upon which the relief prayed or any relief can be granted.

## SECOND DEFENSE

### I.

Defendant denies that the Acts of Congress specified in Paragraph I of the Second Amended Petition in Condemnation, to-wit:

The Act of Congress approved June 4, 1897, (30 Stat. 34-36);

The Act of Congress approved November 9, 1921, (42 Stat. 212, 218);

The Act of Congress approved September 5, 1940, (54 Stat. 867);

The Act of Congress approved July 12, 1943, (Public Law 129, 78th Congress, Chapter 215, 1st session);

The Act of Congress approved July 13, 1943, (Public Law 146, 78th Congress, Chapter 236, 1st session); and

The Department of Agriculture Appropriation Act of 1942 (c. 267, 1st session Pub. Laws, 144, 77th Congress);

or any of them, or any act supplementary to or amendatory of said acts, or any of them, authorize



the United States to acquire the lands described in said Second Amended Petition in Condemnation; denies that the Act of August 1, 1888, c. 728 (25 Stat. 357), or any act supplementary thereto or amendatory thereof, authorized the United States to acquire said lands by condemnation; and denies that said lands are or can be taken under or in accordance with the Act of Congress approved [25] February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) or under or in accordance with any act supplementary thereto or amendatory thereof.

## II.

For answer to Paragraph II of said Second Amended Petition in Condemnation, defendant denies that it is necessary and advantageous to acquire for the United States by condemnation or otherwise the lands described in said Second Amended Petition in Condemnation for the purposes described in said acts, expressly denying that any of the acts referred to authorize the acquisition of such lands or any of them, and not having information sufficient to form a belief as to the remaining allegations in said Paragraph II contained, denies each and every other allegation in said paragraph contained, expressly and directly denying that the purported selection, designation and determination of the Under-Secretary of Agriculture of the United States have ever been or are now in full force and effect.

## III.

Answering Paragraph VI of said Second

Amended Petition in Condemnation, this defendant denies each and every allegation therein contained, save and except that it admits that \$8,968.00 has heretofore been deposited in the registry of this court, and that the original petition in condemnation was filed herein on January 21, 1942, particularly denying that any title whatsoever, whether in full fee simple absolute or otherwise, has been taken or may be taken under the laws and Constitution of the United States and particularly the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States and the Ninth Amendment [26] to the Constitution of the State of Washington under or by virtue of any Declaration of Taking heretofore filed in this cause.

Wherefore, defendant prays that Petitioner take nothing by virtue of its Second Amended Petition in Condemnation, but that the same may be dismissed and this defendant may go hence with its costs and disbursements herein required to be expended, but that if it be determined that the Petitioner is entitled to acquire said lands, or any part thereof, by condemnation, the just compensation to be paid this defendant for such of its lands as shall be taken shall be determined by a jury of twelve persons, in accordance with the Constitutions of the United States and of the State of Washington, and that it may have judgment for the amount of such compensation with interest as

may be provided by law and for its costs and disbursements herein caused to be expended.

POLSON LOGGING COMPANY,  
By /s/ F. D. METZGER,  
/s/ L. B. DONLEY,  
/s/ METZGER, BLAIR &  
GARDNER,  
Its Attorneys. [27]

United States of America,  
Western District of Washington,  
Southern Division—ss.

F. A. Polson, being first duly sworn, on oath, deposes and says: That he is the President of Polson Logging Company, a corporation, the answering defendant herein, and authorized to make this verification for and on its behalf; that he has read the above and foregoing Answer of Polson Logging Company to Second Amended Petition in Condemnation, knows the contents thereof, and believes the same to be true.

F. A. POLSON.

Subscribed and sworn to before me this 10th day of November, 1945.

[Seal] F. D. METZGER,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Nov. 12, 1945. [28]

## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 13th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 13th day of November, 1945, this cause comes on for further trial. All jurors, counsel and parties present. Trial is resumed. Petitioner Witness Earl Phillips resumes the witness stand and further testifies. On oral motion of Mr. Stella and no objections by Respondent, Petitioner Exhibits 4 and 5 having previously been admitted, are now withdrawn and the jury is instructed to disregard same. Petitioner Exhibit 9 admitted. Petitioner Witness B. D. La Salle sworn and testifies. Petitioner Exhibits 10, 11, 12, 13, 14, 15, 16, 17 admitted. Petitioner Witness Leonard Blodgett sworn and testifies.

At 11 a.m. court recessed. At 11:15 court is again in session. All jurors, counsel and parties present. Trial is resumed. Petitioner Witness W. H. Abel sworn and testifies.

At 12 noon court recessed until 1:45 p.m. At 1:45 p.m. court is again in session. All jurors, counsel and parties present. Trial is resumed.

Petitioner Witness W. H. Abel resumes the witness stand and further testifies. Petitioner Witness Paul H. Logan sworn and testifies. [29]

At 2:50 court recessed. At 3:05 court is again in session. Ex parte matters heard. At 3:10 trial is resumed. All jurors, counsel and parties present. Petitioner Witness Paul H. Logan resumes the witness stand and further testifies. Petitioner Witnesses Norman Porteous, W. H. Thomas sworn and testify. Petitioner Witness Norman Porteous recalled and further testifies. At 4:15 petitioner rests and the jurors are excused until 10 a.m. Wednesday. Mr. Metzger now moves the court that the action be dismissed as to Tracts 2 and 3. The court permits the petitioner to make proof as to the use of Tracts 2 and 3 and the court will later consider the motion. Mr. Metzger moves that the court dismiss the action as to the Respondent Polson Logging Company. [30]

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## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 14th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 14th day of November, 1945, this cause comes on for further trial. All counsel and parties present. Juror Harry Fellows not present due to illness. The jurors are temporarily excused. In the absence of the jury counsel for petitioner and respondent stipulate that if Juror Harry Fellows is not able to be present on Monday, November 19, that the trial will proceed with 11 jurors. The jurors return to the court room and at 10:15 a.m. jurors are excused until Monday at 10 a.m. Remarks by the court and all counsel re stipulation in certain matters. [31]

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#### RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 19th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceeding had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 19th day of November, 1945, this cause comes on before the court for further trial. All jurors, counsel and parties present. Trial is resumed. Petitioner files requested instructions, Respondent files requested instructions. Permission of the court having been obtained, the petitioner re-opens its case. Petitioner Witnesses Lester Edge, Paul H. Logan, W. H. Thomas, H. D. La Salle, W.



H. Abel and Norman Porteous all recalled and further testify.

At 10:25 the government rests. Mr. Metzger on behalf of the respondent now renews motion that petition be dismissed as to Tracts 2 and 3. Motion denied and exception allowed.

Opening statement by Mr. Blair on behalf of respondent. Respondent Witness Andrew Anderson sworn and testifies. Respondent Exhibits A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10 and A-11 admitted.

At 11:02 court recessed 15 minutes. At 11:17 court is again in session. All jurors, counsel and parties present. [32] Trial is resumed. Respondent Witness Andrew Anderson resumes the stand and further testifies.

At 12:10 court recessed until 1:45. At 1:45 p.m. court is again in session. All jurors, counsel and parties present. Trial is resumed. Respondent Witness Andrew Anderson resumes the witness stand and further testifies. Respondent Witness Lem Forrest sworn and testifies. Respondent Exhibit A-12 admitted.

At 3:10 court recessed 15 minutes. At 3:25 court is again in session. All jurors, counsel and parties present. Trial is resumed. Respondent Witnesses Charles E. Reynolds and Blain H. McGillicuddy sworn and testify. Respondent Exhibit A-13 marked for identification and offered. Objections by Petitioner sustained and exhibit not admitted.



At 4:40 jurors are excused until 10 a.m. Tuesday.

In the absence of the jurors Mr. Blair makes offer of proof by Respondent Witness Charles Reynolds. Objections of petitioner sustained and offer of proof denied. Mr. Blair makes offer of proof by Respondent Witness Blain McGillicudy. Objections of petitioner sustained and offer of proof denied. [33]

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[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS OF  
PETITIONER

Comes Now the petitioner and requests that the following instructions be submitted to the jury.

/s/ F. P. KEENAN,

/s/ ANTHONY L. STELLA,

Attorneys for Petitioner. [34]

Instruction No. I.

It is the duty of the Court to explain to you the issues of this case, which you are called upon to determine by your verdict, and to instruct you as to the applicable rules and principles of law by which you must be guided in your deliberations. It is your duty to accept these instructions as correct and, so far as the law of the case is concerned, to be guided by them.

The Government of the United States possesses what is known in law as the power of eminent domain. This means that in the exercise of its legitimate functions it has the right to take private prop-

erty whenever such property is necessary for the public use. In the exercise of that power the Government institutes a condemnation action. [35]

### Instruction No. II.

In your deliberations there is no room for sympathy, sentiment, or prejudice or passion. It is your duty to weigh the evidence calmly and dispassionately; to regard the interests of the parties to this action as the interests of strangers; and to decide the issues upon the merits. All persons are equal before the law, and all are entitled to exact justice, no more and no less. [36]

### Instruction No. III.

The just compensation to which the owners of condemned property are entitled is the cash market value of the property. Market value is the amount that in all reasonable probability would be arrived at in a sale for cash between an informed owner, willing but not compelled to sell, and an informed buyer, willing but not compelled to buy. In arriving at that value you will take into account all of the considerations that would fairly be brought forward and reasonably be given weight by well-informed men engaged in such bargaining.

Central Pacific Railroad v. Feldman, 152 Cal. 310; Sacramento Southern Ry. v. Heilbron, 156 Cal. 408; East Bay Municipal, etc., Dist. v. Keefer, 99 Cal. App. 240; Temescal Co. v. Marvin, 121 Cal. App. 512; Olson v. United States, 292 U. S. 146; Orgel on Valuation, pp. 62 ff. [37]

## Instruction No. IV.

Since the fair cash market value is the amount that in all reasonable probability would be arrived at in a sale for cash between an informed owner, willing but not compelled to sell, and an informed buyer, willing but not compelled to buy, you should not consider any unwillingness of the owner to sell the property or have it condemned.

Likewise, you should not consider the value of the property to the Government in determining its fair cash market value. The fact that the Government needs the property in no way serves to increase the market value, and you should not consider the Government's need in your deliberations. [38]

## Instruction No. V.

The respondent, Polson Logging Company, has the burden of proving the just compensation to which it is entitled by the fair preponderance of the evidence.

## Instruction No. VI.

By a fair preponderance of the evidence as used in these instructions, is not necessarily meant the greater number of witnesses furnished by either side, but rather that evidence which when considered by you in relation with all the other evidence proffered by either side, is the more convincing to your minds.

## Instruction No. VII.

In awarding compensation for the land being condemned you should bear in mind that you are concerned with the reasonable market value of the land

as of October 22, 1943, and not any future value that the land may hereafter have, since no human tribunal is able to determine what value land may have at some future date.

United States v. First Nat'l Bank, 250 Fed. 299, 301; Brett v. United States, 86 F. 2d (C.C.A. 9) 305, 307. [41]

#### Instruction No. VIII.

Just compensation does not include speculative elements. While property is to be valued with reference to all the uses to which it is adapted, your consideration of possible future uses of the property should not take in future uses which upon the evidence you find to be remote, speculative and uncertain. [42]

#### Instruction No. IX.

In determining the just compensation to be paid for the taking of the property in this case, you should not take into consideration any forest holdings in the area owned by the United States, as the needs of the United States can not be considered by you in fixing the fair cash market value of the land condemned. [43]

#### Instruction No. X.

In determining the just compensation to be paid for the taking of the property in this case, you should not take into consideration any timber owned by anyone except the respondent, Polson Logging Company, as the effect of such timber holding upon the value of this land over which was constructed

a truck logging road is too remote and speculative to have any place in your deliberations, as there was no knowing when or how the timber would be logged or the route over which it would be taken.

Meskill & Columbia River Ry. Co. v. Luedinghaus, 78 Wash. 366, 139 Pac. 52 (1941).

King County v. Joyce, 96 Wash. 520, 165 Pac. 399 (1917). [44]

#### Instruction No. XI.

Since the respondent is entitled to receive no more than indemnity for his loss, the Polson Logging Company's award cannot be enhanced by any gain to the Government. While you are to determine the fair cash market value, after due consideration of all reasonable uses to which the property could be put, the special value to the Government as distinguished from other users must be excluded as an element of market value. The fact that there is a large stand of national forest timber, which may be logged in the future and hauled out over this road, should not be considered by you. The presence of the truck logging road upon this property is to be given weight in determining the fair cash market value of the property only if you find that a private purchaser would pay more for the land because of the road. [45]

#### Instruction No. XII.

In determining the just compensation to be paid by the Government to the respondent, you will not take into consideration the truck logging road lo-

cated upon the property condemned, unless you find from the evidence that the existence of said road enhances the fair cash market value of the land taken. The value, if any, of this truck logging road is to be included by you in the total award, only to the extent that you find from the evidence it increased the market value of the land taken. [46]

Instruction No. XIII.

In determining whether any private purchaser would purchase the road in question here for road purposes, you are not to consider the amount which any private purchaser would pay for such road, if the purpose of such private purchaser in purchasing that road was to control timber within the Olympic National Forest. [47]

Instruction No. XIV.

In determining the compensation to be paid by the United States for the taking of this property, you should not consider the value of the land for road purposes, unless you find that it had a value for road purposes to some private purchaser. You cannot allow any value for such road over and above the amount which you believe such private purchaser, acting as a reasonable, prudent and informed man, would pay for it.

If you find that there was no reasonable prospect that the road could be sold to a reasonable, prudent and informed private purchaser for road purposes, then you should not increase the amount of your award because of the existence of the road. [48]



## Instruction No. XV.

In determining the weight to be given to testimony relative to the cost of reproducing the road and bridges here in question, new less depreciation, you are first to determine if a reasonably prudent man would purchase or undertake to construct a road at such cost.

If you find that the reproduction cost new, as testified to for the road and bridges taken, is so excessive that no reasonably prudent man would purchase or undertake to construct the road and bridges at such a price, you are to disregard all testimony relative to reproduction cost new, and such testimony is to be given no effect in your determination of the fair cash market value of the property.

United States v. Boston C. C. & New York Canal Co., et al., 271 F. 877.

Re Long Island Lighting Company (N. Y. Public Service Com.), P.U.R. 1922B 1; 37 Harv. L. Rev., (1924) 431, 441, 453, et seq. [49]

## Instruction No. XVI.

In determining the just compensation to be paid to the Polson Logging Company, you should not take into consideration the value to the Government, if any, of the truck logging road. The fact that the Government utilized this grade in the construction of the present road in no way serves to increase the compensation to be paid the respondent company and consideration of that circumstance has no place in your deliberations. [50]



## Instruction No. XVII.

The just compensation to be paid by the United States for the taking of the property condemned is the fair cash market value as that term has been defined to you in these instructions. However, if you find from the evidence that the fair cash market value of the remainder of respondent's property has been diminished by the taking of a portion of said land, you are to consider the damages, if any, to said remainder in determining the just compensation. This is called severance damage.

In the event that you find from the evidence that the fair cash market value of the remainder of respondent's property has been diminished, you are to determine the just compensation to be paid for the taking of a portion of the respondent's land and damages to the remainder, by determining the fair cash market value of the entire tract immediately prior to the date of taking, and subtracting therefrom the fair cash market value of the remaining land not taken, immediately after the date of taking.

## Instruction No. XVIII.

If you find from the evidence that the market value of the remaining property owned by the Polson Logging Company was increased in value by reason of the construction and improvement of this road by the Government and that the increase in value exceeds the damages suffered by the Polson Logging Company, your verdict should be for the Polson Logging Company for nominal damages

only. By nominal damages is meant some small amount as, for example, the sum of \$1.00. [52]

#### Instruction No. XIX.

You are instructed that if you find the fair cash market value of the remaining portion of Polson Logging Company's land will be enhanced or increased by reason of the construction or improving of the highway, for which the lands in question are taken, such increase in market value is a special benefit which you should offset against the just compensation computed according to the instructions heretofore given you. You should offset such benefits notwithstanding you may also find that market value of other lands in that vicinity may also be increased or enhanced by reason of the building of the proposed highway. [53]

#### Instruction No. XX.

If you find from the evidence that the road as constructed and improved by the Government increases the usefulness of the remaining property of the Polson Logging Company not taken, and enhances its market value, the advantages thus conferred by this road to the remaining property are special benefits and these special benefits should be considered by you in determining the just compensation to be paid for the property taken. [54]

#### Instruction No. XXI.

You are instructed that in arriving at your verdict in this case, you must not give your assent to, or be a party to, any conclusion and verdict other than or

different from your own, and that you must not arrive at your verdict by resort to the determination of any chance or lot; or by any arbitrary addition of the several amounts of award deemed proper by the several jurors respectively, and by division thereof by the number of such jurors so as to arrive at an average or quotient verdict. Instead, you are instructed that you must bring in as a verdict such amount as ten of you agree upon as your own conclusion and finding. [55]

Instruction No. XXII.

You are instructed that the United States has condemned the land in this case, among other uses, for use as a permanent highway and for use of the people of the United States generally, for all lawful and proper purposes having regard to the geographical, topographical and other conditions of said Olympic National Forest and lands in the vicinity thereof, which affect the welfare, safety and preservation of the Forest.

In determining the just compensation to be paid by the Government to respondent, Polson Logging Company, you should take into consideration the fact that said respondent, Polson Logging Company, has the right to use said highway as a member of the general public.

[Endorsed]: Filed Nov. 19, 1945. [56]

[Title of District Court nad Cause.]

RESPONDENT'S POLSON LOGGING COMPANY'S REQUESTED INSTRUCTIONS

Comes now the respondent, Polson Logging Company, and requests the Court to give to the jury the following instructions numbered 1 to 12.

L. B. DONLEY,  
F. D. METZGER,  
METZGER, BLAIR &  
GARDNER,

Attorneys for Respondents,  
Polson Logging Company.

Instruction No. 1

In a proceeding under the power of eminent domain, such as this, there are, under the constitutional provisions of both the State of Washington and the United States, two elements of primary importance. The first is that the right of the Government to take the property of respondent, Polson Logging Company, may be exercised only upon the condition that the Government shall see to it that just compensation for the property so taken, as well as any damages to any remaining property of the respondent by reason of the taking, be ascertained and paid. Accordingly, the burden of proof is upon the petitioner, the United States of America, to establish what amount will constitute just compensation, that is, the petitioner must establish by a fair preponderance of the evidence that the amount contended for by it will constitute just compensation.

The second is that in a constitutional society, such as ours, the fullness and sufficiency of the guarantees which surround the owners of property, whether an individual or a corporation, in the use and enjoyment of such property, constitute one of the most certain tests of the character and value of the government of such a society. So here, the fullness and sufficiency of the security afforded by the State and Federal Constitutions to an owner of property against the arbitrary taking of it by the Government is tested by the action of the jury, to whom is left the ascertainment and determination of the just compensation to be paid the owner. [58]

#### Instruction No. 2

This trial is solely for the purpose of determining the just compensation that should be paid to the owners, respectively, first, for the property which the United States seeks to take, and second, for the damage, if any, done by reason of such taking to any other or remaining property of the owners. It is your duty to fix and determine that just compensation under the evidence and in accordance with these instructions.

It is your duty to determine the fair cash market value for the property being condemned, and to separately determine the severance damage, if any, to the remaining property. When you have determined these two amounts you will add them together and the entire amount will constitute your verdict. [59]

## Instruction No. 3

The owner of property sought to be condemned is entitled to its "market value fairly determined." That value may reflect not only the use to which the property was devoted at the time as of which the market value is to be determined, but also that use to which it may be readily converted. In that connection, the value of the property is not to be measured merely by the use to which it is or can be put as a separate tract, but you must consider and determine that value in the light of any special or higher use for which the property in question may be available in connection with other properties, if you find from the evidence that there is a reasonable probability of such connection in the reasonably near future. [60]

## Instruction No. 4

"Just compensation" includes all the elements of value that inhere in the property and corresponds to the full, fair cash market value thereof, fairly determined. Ordinarily, market value means the price property will bring in the market. The term "market" presupposes some competition between buyers on the one hand and sellers on the other. It implies that there are several possible buyers so that the seller is not limited to a single buyer if he is to make a sale, and likewise that there are several possible sellers of similar property so that the buyer is not restricted to a single seller, but can weigh the respective merits of the properties offered. Accordingly, "market value" is the amount or price which



would be arrived at as of October 22, 1943, and under such conditions by fair negotiations between an owner willing to sell, but free to sell or to refuse to sell as the price suited, and a purchaser desiring, but under no necessity, to buy. Therefore, in determining the just compensation to be paid the owner, you should take into account all considerations, so far as shown by the evidence, which you believe might fairly be brought forward and reasonably given weight by well informed persons engaged in such bargaining. [61]

#### Instruction No. 5

In determining the value of property appropriated for public purposes, the same considerations are to be regarded and given weight as would be in the case of a sale of property between private parties. In other words, you are to determine from the evidence submitted in this case what a willing buyer having the means so to do would pay in cash to a seller who was willing, but under no necessity, to sell. Your inquiry must be: What would the property bring in cash if sold as the result of such negotiation? In determining such value, the property is to be viewed not merely with reference to the uses to which it was at the time in question applied, but with reference to the uses to which it is plainly adapted; that is to say: What is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or be regarded as valueless because the owner at the particular time is not actually putting



it to its most valuable use or even unable to put it for the time being to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life or business. Its capability of being made thus available gives it a market value, which you must determine. [62]

#### Instruction No. 6

“Just compensation,” under both the State and Federal Constitutions, does not mean inadequate compensation but rather means the full and perfect equivalent in money of the property taken or damaged by or in the name of the State. To give to an owner the full and perfect equivalent of the property taken from him or damaged in the taking, means that upon the receipt of the compensation awarded by the jury’s verdict he shall be put in as good a position pecuniarily as he would have occupied if his property had not been taken and will not be poorer by reason thereof. [63]

#### Instruction No. 7

Ordinarily “market value” is established by actual sales of similar property currently made in a free and open market. However, properties such as those involved here have no established market price because of the absence of sufficient current or recent sales. Accordingly, resort must be had to other data to ascertain and determine that value. [64]

#### Instruction No. 8

In arriving at the value of the property involved in this case, it is essential that the jury consider the

character, nature and extent of the improvements and the uses to which the land in its improved state may be put. The jury should consider whether the property is adapted to the particular uses claimed for it and whether it is or it is not profitable and valuable for such uses. Whether property is profitable and valuable for a particular use is always a controlling consideration in determining the value of the property itself. [65]

#### Instruction No. 9

In determining the amount of just compensation to be awarded, the proper inquiry is "What has the owner lost?" and not "What has the taker gained?". You should not consider the need, if any, of the government for the property taken, or the value of such property to the government upon acquisition. The utility or availability of the property for the special purpose of the government cannot be considered if the government is the only party who can use the property for that purpose. However, if you find the property has a special utility or availability not only to the government but to other parties who could use the property for the particular purpose of use intended by the government, then this utility or availability for use should be considered by you.

United States vs. Canal Co., 271 Fed. 877, 893; Grand Hydro vs. Grand River Dam Authority, (Okla.) 139 Pac. (2d) 798, 801. [66]

#### Instruction No. 10

The market value of property is determined by

taking into account the highest possible use to which the property is or may reasonably be put or be adapted and what purchasers would be willing to pay for it and owners accept for it in view of such highest possible use. In determining market value the special adaptability or availability of property for the use for which it is taken may be shown and taken into account if such adaptability or availability would increase the value of the property in the eyes of purchasers generally in the open market quite apart from the necessities or needs of the particular condemnor.

Metropolitan Water District vs. Adams, 116 Pac. (2d) 7, 17. [67]

#### Instruction No. 11

In eminent domain proceedings the award of just compensation must be measured by the actual property and legal property rights taken from the owner and not by the use which the taker may make of the property taken. Damages must be assessed in this proceeding once and for all. The amount of those damages cannot be diminished by any expectation or possibility that the government may at some future time or from time to time permit the respondent to use the property taken either gratuitously or upon payment of some charge for such use.

State ex rel Polson Logging Company vs. Superior Court, 11 Wash. (2d) 545, 119 Pac. (2d) 694; United States vs. Oakland Hotel, 53 Fed. Supp. 767. [68]

## Instruction No. 12

You should consider the care and accuracy with which the various experts respectively determined the data upon which they base their conclusions. If one or more of the experts seemed to the jury to use more specific and accurately obtained data for their estimates and to give more satisfactory reasons for their conclusions, the jury may give more credence to that expert or those experts and his or their conclusions. You are not bound by any expert testimony but it should be considered by you in connection with the other evidence in the case.

[Endorsed]: Filed Nov. 19, 1945. [69]

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[Title of District Court and Cause.]

ADDITIONAL INSTRUCTION REQUESTED  
BY RESPONDENT POLSON LOGGING  
COMPANY

Comes now Respondent, Polson Logging Company, a corporation, and requests that the Court give to the Jury in this case the following additional instruction numbered 13.

L. B. DONLEY,  
F. D. METZGER,  
METZGER, BLAIR &  
GARDNER,

Attorneys for Respondent  
Polson Logging Company.

## Instruction No. 13

The jury are instructed that in determining the just compensation to be paid respondent Polson Logging Company, they are to take into consideration the nature and extent of the property of respondent, with the improvements thereon, in the condition in which it was on Oct. 22, 1943, what it would have cost to reconstruct or reproduce said property and such improvements at that date, the depreciation which had accrued at said date in said property, the timber which was rendered accessible or was tributary to and which the jury believe from the evidence will in reasonable probability be transported thereover, the revenue which said respondent has heretofore derived from the use of such property for the transportation of logs and timber products together with the revenue which they believe it is reasonably probable that said respondent would have derived in the future, and any and all other factors which the jury believe would be given consideration and weight in bargaining for the sale and purchase of such property between purchasers willing and able but not compelled to buy, on the one hand, and sellers willing but not compelled to sell, on the other.

[Endorsed]: Filed Nov. 19, 1945. [71]

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## RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the

20th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 20th day of November, 1945, this cause comes on before the court for further trial. F. P. Keenan and A. L. Stella, represent the government and F. D. Metzger and A. E. Blair represent the respondent. All jurors, counsel and parties present. Trial is resumed. Respondent Witness Blain H. McGillicuddy resumes the witness stand and further testifies. Respondent Witness Frank D. Hobe sworn and testifies.

At 11 a.m. Court recessed. At 11:20 court is again in session. All jurors, counsel and parties present. Trial is resumed. Respondent Witness Frank D. Hobe resumes the witness stand and further testifies. Respondent Witness Len Forrest recalled and further testifies.

At 11:55 the jurors are excused until 1:30. In the absence of the jurors, Mr. Blair on behalf of respondent makes offer of proof by Respondent Witness Frank Hobe. Objections by Petitioner sustained and offer denied. Mr. Metzger on behalf of respondent makes offer of proof by Respondent Witness Len Forrest. Objections of petitioner sustained and offer denied. Respondent [72] Exhibit A-14 marked and offered. Objections of petitioner sustained and exhibit not admitted.



At 12:10 court recessed until 1:30 p.m. At 1:30 p.m. court is again in session. All jurors, counsel and parties present. Trial is resumed. At 1:35 the respondent rests. Opening argument by Mr. Keenan. Respondents waive argument to jury.

At 2:05 court recessed 25 minutes. At 2:40 p.m. court is again in session. All jurors, counsel and parties present. Charge to the jury by the court. Bailiffs are sworn on taking charge of the jury. At 3:10 the jurors retire to deliberate. Exceptions to the court's instructions by the petitioner in not giving Petitioner Instructions Nos. 22 and 5 and the court's instruction that the jury's decision must be unanimous. Exception to the Court's instructions by Respondent in its failure to give Respondent Instructions Nos. 3, 8, 9, 11 and 13. Exceptions to the above instructions allowed by the court.

At 4:50 court is again in session. All jurors, Counsel Metzger, Keenan and Stella present. Jury Foreman Ora Murray states that the jury has arrived at a verdict, which is read by the clerk as follows:

We, the jury empanelled and sworn to determine the just compensation to be paid for the taking of the fee simple title to that certain property referred to in the above-entitled case as Line A, B (except that portion of Line B which is in Sec. 16, & 21 N, R 9W, W.M.), C, D, F, G, H, I, J, K, and L and Tracts 1, 2 and 3 as shown in Petitioner's Exhibit 2, in this case, and for the Right of Way of the Polson Logging Co., along said Line B [73] in Sec.



16, T 21 N, R 9 W, W.M., do find the amount of such just compensation to be Six Thousand Five Hundred Dollars (\$6,500).

Dated at Tacoma, Washington, this 20th day of November, 1945.

/s/ ORA L. MURREY.

Jurors are polled and each answer affirmatively.  
Jurors are excused until notified to appear. [74]

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[Title of District Court and Cause.]

VERDICT

We, the jury, duly empanelled and sworn to determine the just compensation to be paid for the taking of the fee simple title to that certain property referred to in the above-entitled case as Lines A, B (except that portion of Line B which is in Sec. 16, T 21 N, R 9 W, W.M.), C, D, F, G, H, I, J, K and L, and Tracts 1, 2 and 3, as shown on Petitioner's Exhibit No. 2 in this case, and for the Right-of-Way of the Polson Logging Co along said Line B in Sec. 16, T 21 N, R 9 W, W.M., do find the amount of such just compensation to be Six Thousand Five Hundred Dollars (\$6,500).

Dated at Tacoma, Washington, this 20th day of November, 1945,

/s/ ORA L. MURREY,

Foreman.

[Endorsed]: Filed Nov. 20, 1945. [75]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Respondent Polson Logging Company and moves the Court to set aside the verdict returned and received herein and grant a new trial, for the following cause materially affecting the substantial rights of said Respondent, to-wit:

Error in law occurring at the trial.

The particular error or errors relied upon are as follows:

1. The denial of Respondent's motion to quash and adjudge null and void the Third Declaration of Taking, dated November 2, 1943, and filed herein November 12, 1943.

2. The granting of the Government's motion for the entry of judgment on said Third Declaration of Taking and the entry of judgment thereon on May 23, 1944.

3. The modification of the Court's order made and entered November 12, 1943, made by the Court on its own motion in its order made and entered May 23, 1944.

4. The confirmation by the judgment entered May 23, 1944, on the Third Declaration of Taking of whatever possession was taken on or about February 5, 1942, under and pursuant to the judgment entered January 23, 1942 on the original Declaration of Taking filed in this cause.

5. The denial of Respondent's motion to quash

and adjudge [76] null and void the Third Declaration of Taking filed November 12, 1943, and to vacate the judgment entered thereon on May 23, 1944.

6. The granting of Petitioner's Motion to Amend said Third Declaration of Taking as to the description of the property therein designated as Line F.

7. The fixing of October 22, 1943, as the date as of which the value of the property of respondent is to be determined.

8. Denial of Respondent's motion to dismiss and strike Petitioner's Second Amended Petition in Condemnation, verified May 1, 1944, and filed May 23, 1944, and the overruling of Respondent's demurrer to said Second Amended Petition.

9. Denial of Respondent's motion to strike from said Second Amended Petition in Condemnation all references to the property therein described as Tracts 2 and 3 and the refusal to dismiss the proceedings as to said Tracts 2 and 3 or to wholly eliminate said Tracts from the proceeding.

10. The exclusion of all evidence of valuation which was in any way based upon or took into consideration the timber in the Olympic National Forest which might reasonably be expected to be removed over the lands and roads being condemned, irrespective of whether such timber belonged to the United States or to third parties.

11. The exclusion of all evidence of valuation which was in any way based upon or took into consideration the timber of third parties, whether with-

in or without the Olympic National Forest, which might reasonably be expected to be removed over the lines and roads being condemned.

12. The striking of the evidence of the witness McGillicuddy as to market value of the property of Respondent.

13. The refusal of the offer of proof by the witness Hobi [77] of the market value of Respondent's property.

14. The refusal of the offer of proof by the witness Forrest of the rate of removal of the timber belonging to the United States within the Olympic National Forest, established or determined by the United States National Forest Service.

15. The exclusion from evidence of the Third Declaration of Taking, exclusive, however, of Paragraph 5 thereof, which Declaration was dated November 2, 1943 and filed herein November 12, 1943.

16. The refusal of Respondent's requested Instruction No. 3, and particularly the failure of the Court to instruct the jury that they are to consider and determine the market value of Respondent's property in the light of any special or higher use for which it may be available in connection with any other properties if they should find from the evidence that there is a reasonable probability of such connection in the reasonably near future.

17. The refusal of Respondent's requested Instruction No. 8.

18. The refusal of Respondent's requested Instruction No. 9, and particularly the refusal or failure of the Court to charge the jury as requested in said instruction that if they find Respondent's property has a special utility or availability, not only to the Government but to other parties who could use the property for the particular use intended by the Government, then such utility or availability or use should be considered by them.

19. The refusal of Respondent's requested Instruction No. 11, and particularly the refusal of the Court to charge the jury that damages must be assessed in the current proceeding [78] once and for all, as set forth in said requested instruction.

20. The refusal of Respondent's requested Instruction No. 13, and particularly the failure and refusal of the Court to charge the jury that in determining just compensation, they were entitled to take into consideration the timber which was rendered accessible by or was tributary to the Respondent's property and which the evidence showed will in reasonable probability be transported thereover, and the revenue heretofore derived from the use of such property for the transportation of logs and other timber products thereover, together with the revenue which they believe it is reasonably probable would be derived in the future.

21. The failure and refusal of the Court to instruct the jury as to the specific factors or elements which were to be taken into consideration by them

in determining the market value of respondent's property.

22. Instructing the jury, and by frequent reiteration unduly emphasizing, that in determining the just compensation to be awarded Respondent, the jury should not take into consideration any timber belonging to the United States nor any toll or charge that might be made for the transportation of timber or other property belonging to the United States or for the transportation of timber removed by third parties from lands of the United States within the Olympic National Forest, or take into consideration any value that might result from the hauling or transportation of Government timber or other property over the lands and roads of Respondent.

23. Instructing the jury that in determining just compensation they were not to take into consideration any potential use to which the United States might put the property being [79] condemned, irrespective of whether such use was one to which the property had already been put by Respondent or to which it could be put in the future by Respondent or third parties.

24. Instructing the jury that in determining just compensation they were not to take into consideration any timber except that owned by Respondent.

25. Instructing the jury that the United States acquired full fee title to the lands and property described in the Second Amended Petition in Condemnation on October 22, 1943.



This motion shall be heard upon the pleadings and papers on file and the minutes of the Court, and all other records in the cause.

L. B. DONLEY,  
F. D. METZGER,  
METZGER BLAIR &  
GARDNER,

Attorneys for Respondent,  
Polson Logging Company

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 23, 1945. [80]

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#### RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 3rd day of December, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.

Now on this 3rd day of December, 1945, this cause comes on for hearing on motion for new trial. F. P. Keenan and A. L. Stella represent the government. F. D. Metzger and A. E. Blair represent the defendant. Argument on motion for new trial by Mr. Metzger. Rebuttal argument by Mr. Keenan. The court now denies motion for new trial and allows an exception to the defendant. Written order to be presented later. [81]



## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 17th day of December, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 17th day of December, 1945, in the above cause, A. L. Stella, Spec. Atty. Dept. of Justice represents the government and F. D. Metzger represents the defendant. Order denying motion for new trial is signed by the court and filed. Mr. Stella presents Judgment on the verdict for the court's signature. Mr. Metzger presents Judgment on the verdict for the court's signature. The court suggests changes in each Judgment and states that the final Judgment on the verdict may be presented on Wednesday, December 20 at 2 p.m.

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[Title of District Court and Cause.]

ORDER DENYING MOTION FOR  
NEW TRIAL

This matter having come on regularly for hearing on December 3, 1945, on motion of respondent, Polson Logging Company, for a new trial, the petitioner, United States of America, being represented

by F. P. Keenan, Special Assistant to the Attorney General, and Anthony L. Stella, Special Attorney, Department of Justice, the respondent, Polson Logging Company, a corporation, being represented by F. D. Metzger and A. E. Blair, of Metzger, Blair & Gardner, its attorneys, and the Court having heard the arguments of counsel for both parties, and being fully advised in the new premises,

Now, Therefore, It Is Hereby Ordered that respondent's motion for a new trial and to set aside the verdict returned and received in this case be and it is hereby denied.

The respondent, Polson Logging Company, a corporation, excepts to the entry of this order and its exception is hereby allowed.

Done in Open Court this 17th day of December, 1945.

CHARLES H. LEAVY,  
United States District Judge.

Presented by:

ANTHONY L. STELLA,  
Special Attorney, Department  
of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Dec. 17, 1945. [83]

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## RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the

19th day of December, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 19th day of December, 1945, this cause comes on for hearing on presentation of proposed Judgment on the Verdict. A. L. Stella, Special Attorney Department of Justice, represents the government. F. D. Metzger represents the defendant. Mr. Stella presents proposed Judgment. Mr. Metzger presents proposed Judgment. Argument on proposed Judgment by Mr. Metzger and Mr. Stella. The court now signs Judgment on the verdict which is filed. [84]

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In the District Court of the United States for  
the Western District of Washington, Southern  
Division

No. 323

UNITED STATES OF AMERICA,

Petitioner,

vs.

POLSON LOGGING COMPANY, a corporation,  
et al.,

Respondents.

**JUDGMENT ON THE VERDICT**

This Matter having come on regularly for hearing and trial on November 12, 1945, before the un-

dersigned Judge of the above entitled Court, the petitioner, United States of America, being represented by F. P. Keenan, Special Assistant to the Attorney General, and Anthony L. Stella, Special Attorney, Department of Justice, the respondent, Polson Logging Company, a corporation, being represented by F. D. Metzger and A. E. Blair, of Metzger, Blair & Gardner, its attorneys, and no other respondent appearing at the trial, a jury having been duly impaneled and sworn to determine the just compensation to be paid for the taking of the property more particularly described in Exhibit "A" hereto attached, witnesses having been sworn and testimony having been taken and the jury having on November 20, 1945, returned its verdict finding the just compensation to be paid for the taking of said property as of October 22, 1943, to be the sum of \$6,500.00, and the respondent's motion for new trial having been denied, and it appearing to the Court that on January 21, 1942, the sum of \$8,280.00 was deposited in the registry of the Court as estimated just compensation for the taking of perpetual easement and right of way, more particularly described in the Petition in Condemnation and Declaration of Taking filed herein on January 21, 1942, in a portion of the property, [85] described in said Exhibit "A", and on October 22, 1943, an additional sum of \$688.00 was deposited in the registry of the Court making a total sum deposited of \$8,968.00 as estimated just compensation for the taking of the full fee simple title to said property, and it further appearing to the Court that the United States of

America entered into possession of that portion of the property condemned in this action designated as Lines A, B, C, D and G, on February 5, 1942, and entered into possession of the remainder on October 22, 1943, and the Court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the verdict of the jury finding and adjudging that the sum of Six Thousand Five Hundred Dollars (\$6,500.00), is the just compensation to be paid for the taking of the property referred to in the above entitled cause as Lines A, B (except that portion of Line B which is in Section 16, T. 21 N., R. 9 W., W.M.), C, D, F, G, H, I, J, K and L, and Tracts 1, 2 and 3, and for the right of way of the Polson Logging Company along said Line B in Section 16, T. 21 N., R. 9 W., W.M., which property is more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof, be and said verdict is hereby approved and confirmed.

2. That the total amount of damages, including the full and fair value of said property appropriated resulting to the persons and parties interested therein by reason of the taking, appropriation, and possession of said property from February 5, 1942, as above set forth, by the United States of America, and the just compensation for the taking thereof is the sum of Six Thousand Five [86] Hundred Dollars (\$6,500.00), without interest, which sum of Six Thousand Five Hundred Dollars (\$6,500.00) is the

full, final and complete compensation to be paid by the United States of America for the taking of this property and for and all claims of damage against the petitioner arising out of the condemnation proceeding.

3. That the Clerk of the above-entitled Court is hereby ordered to disburse the sum of Six Thousand Five Hundred Dollars (\$6,500.00), without interest, from the registry of this Court, as follows:

To: Polson Logging Company, a corporation,  
\$6,500.00

4. That title to the property taken is vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character whatsoever.

The Respondent, Polson Logging Company, a corporation, excepts to the entry of this judgment and its exception is hereby allowed.

Done in Open Court this 19th day of December, 1945.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

ANTHONY L. STELLA,  
Special Attorney,  
Department of Justice.

(Acknowledgment of Service attached.)

Respondent Polson Logging Company, a corporation, duly excepted to the signing and entry of the foregoing judgment and to each and every part thereof, and particularly excepted, [87] (a) to the



recital or finding as to the taking of possession, upon the ground that such finding or recital is improper and was not in issue herein; (b) to so much of said judgment as confirms the verdict of the jury and decrees the just compensation to be the sum of \$6,500.00, upon the ground that all evidence as to a material element in determining such just compensation was erroneously excluded and the jury were not permitted to take into consideration such element in arriving at just compensation; and (c) to that portion of said judgment decreeing that title is vested in the United States of America, upon the ground that no authority for such taking was pleaded or proven; and Respondent's said exceptions were and are hereby allowed, and (d) to the finding or recital as to the taking of possession of portions of the lands on February 5, 1942, and of the remainder on October 22, 1943, because unfounded in fact and erroneous in law.

CHARLES H. LEAVY,

United States District Judge.

(Acknowledgment of Service attached.) [88]

#### EXHIBIT "A"

Those certain lands located in Grays Harbor County, Washington, referred to in this cause as Tracts 1, 2 and 3, Lines A, B, C, D, E, G, H, I, J, K and L, all in Township 21 North, Ranges 9 and 10 West of the Willamette Meridian, being more particularly described as follows:

Here follows detailed description of the lands con-



denmed which were owned by appellant, Polson Logging Company, which description of Lines A, B, C, D, F, G, H, I, J, K and L, and Tracts 1, 2 and 3, is identical with the description of said lands appearing in Paragraph III of the Amended Petition in Condemnation filed October 22 1943 (printed transcript of record on former appeal, Cause No. 10870, pages 49 to 57), as amended by order of the District Court, entered June 7, 1944 (printed transcript of record on former appeal, Cause No. 10870, page 129), and by order of the District Court amending Declaration of Taking and subsequent pleadings entered September 20, 1945 (Item 31 of appellant's designation of contents of record on appeal), except for the following words which appear after the description of Line B in the Judgment on the Verdict entered December 19, 1945:

Excepting that portion of Line "B" which lies within Section 16, Township 21 North, Range 9 West Willamette Meridian which was vested in the State of Washington as more particularly shown on the map attached to the Declaration of Taking filed herein on October 22, 1943, but including the right of way of the Polson Logging Company along said Line "B" in said Section 16, Township 21 North, Range 9 West Willamette Meridian.

[Endorsed]: Filed Dec. 19, 1945.

[Title of District Court and Cause.]

### MOTION

Comes Now the United States of America through its attorney of record, Anthony L. Stella, Special Attorney, Department of Justice, and moves the Court for an order directing the Clerk of the Court to cancel the check issued to the Polson Logging Company, in the above entitled matter on the 21st day of December, 1945, and to reissue same upon further order of the Court. This motion is based upon the fact that on the 15th day of January, 1946, Check No. 5,383 dated December 21, 1945, payable to Polson Logging Company, a corporation, in the sum of \$6,500.00, in payment of Judgment in the above entitled cause, issued by the Clerk of the Court, was tendered to Metzger, Blair and Gardner, attorneys for Polson Logging Company; that said attorneys refused to accept said check stating that an appeal will be taken from the Judgment entered in this cause.

Dated this 17th day of January, 1946.

/s/ ANTHONY L. STELLA,

Special Attorney, Department  
of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Jan. 18, 1946. [93]

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### RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the

18th day of January, 1946, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 18th day of January, 1946, in the above matter, A. L. Stella, Special Attorney Department of Justice, represents the government and files motion for Order returning check to the clerk. Order directing Clerk to cancel check signed by the court and filed. [94]

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[Title of District Court and Cause.]

### ORDER

This matter coming on for hearing this day upon the Motion of the petitioner, United States of America, through its attorney of record, Anthony L. Stella, Special Attorney, Department of Justice, for an order directing the Clerk of this Court to cancel Check No. 5,383 dated December 21, 1945, payable to the order of Polson Logging Company, a corporation, in the sum of \$6,500.00 and to reissue the same upon further order of this Court. It appearing to the Court that said check was tendered to Metzger, Blair and Gardner, attorneys for Polson Logging Company, a corporation, on the 15th day of January, 1946, in payment of Judgment entered herein in favor of the respondent, Polson Logging Company, a corporation, in said amount, and respondent through its attorneys, Metzger, Blair and Gardner,

having refused to accept the tender of said check for the reason that it will appeal from the Judgment entered herein; and the Court being fully advised in the premises; now, therefore, it is hereby

Ordered that the Clerk of this Court be and he is hereby directed to cancel Check No. 5,383 dated December 21, 1945, payable to Polson Logging Company, a corporation, in the sum of \$6,500.00, subject to reissue upon the further order of this Court.

Done in Open Court this 18th day of January, 1946.

CHARLES H. LEAVY,  
United States District Judge.

Presented by

ANTHONY L. STELLA,  
Special Attorney, Department  
of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Jan. 18, 1945. [95]

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Polson Logging Company, a Washington corporation, one of the respondents above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment entitled "Judgment on the Verdict," made and entered in the above entitled Court and cause on December 19, 1945, and from each and every part and the whole thereof, and

for greater certainty also appeals from that certain judgment entitled "Judgment on Declaration of Taking," made and entered in the above entitled Court and cause on May 23, 1944, and from each and every part and the whole thereof.

Dated at Tacoma, Washington, this 16th day of March, 1946.

L. B. DONLEY,

F. D. METZGER,

Attorneys for Appellant.

METZGER, BLAIR, GARDNER  
& BOLDT,

Of Counsel for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed March 18, 1946. [96]

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[Title of District Court and Cause.]

#### BOND FOR COSTS ON APPEAL

Know All Men By These Presents, That we, Polson Logging Company, a Washington corporation, a respondent herein, as principal, and Hartford Accident and Indemnity Company, a corporation organized under the laws of the State of Connecticut and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the United States of America, petitioner herein, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) lawful money of the United States, for the payment of which sum well and truly to be made to said petitioner we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that whereas in the above entitled court and cause a judgment entitled "Judgment on Declaration of Taking" was made and entered on May 23, 1944, and a further judgment entitled "Judgment on the Verdict" was made and entered on December 19, 1945, and said respondent Polson Logging Company is about to file with said District Court of Appeals for the Ninth Circuit from said Judgment on Declaration of Taking entered May 23, 1944, and from said Judgment on the Verdict entered December 19, 1945, and from each and every part [98] and from the whole of said judgments;

Now, Therefore, the condition of this obligation is such that if said Polson Logging Company shall pay all costs if said appeal is dismissed or said judgment affirmed or such costs as the appellate court may award if said judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the above bounden principal and surety have executed the foregoing bond this 18th day of March, 1946.

POLSON LOGGING COMPANY,

By /s/ L. B. DONLEY,  
/s/ F. D. METZGER,

Its Attorneys of Record.

[Seal] HARTFORD ACCIDENT AND  
INDEMNITY COMPANY,

By /s/ HAROLD N. MANN,  
Its Attorney in Fact. [99]



State of Washington,  
Sounty of Pierce—ss.

On this 18th day of March, 1946, personally appeared before me Harold N. Mann, to me known to be the Attorney-in-Fact of Hartford Accident and Indemnity Company, the corporation that executed the within and foregoing instrument, as surety, and acknowledged said instrument to be the free and voluntary act and deed of said Hartford Accident and Indemnity Company for the uses and purposes therein mentioned and on oath stated that he was authorized to execute the same for and on behalf of said corporation, and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ VIVIAN PARENT,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

[Endorsed]: Filed March 18, 1946. [100]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR  
DOCKETING APPEAL

Polson Logging Company, a corporation, one of the respondents herein, having filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered



herein December 19, 1945, together with bond for costs on appeal, and having applied for an extension of time within which to file the record on appeal and docket said appeal in the Circuit Court of Appeals for the Ninth Circuit, and good cause appearing for the extension so applied for,

It Is Ordered that the time for filing the record on appeal and docketing the action in said Circuit Court of Appeals be and is hereby extended to and including June 1, 1946.

It Is Further Ordered that said appellant Polson Logging Company, a corporation, shall have and is hereby allowed to and including April 15, 1946, within which to serve and file its designation of the portions of the record, proceedings and evidence herein to be contained in the record on appeal and its statement of the points on which it intends to rely on such appeal.

Done in open court this 18th day of March, 1946.

/s/ CHARLES H. LEAVY,

Judge.

Presented by:

F. D. METZGER.

[Endorsed]: Filed Mar. 18, 1946. [101]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL

Comes now the appellant, Polson Logging Company, and states that on the appeal of the above entitled cause it intends to rely on the following points:

1. Appellant reaffirms and makes part hereof by this reference the eight points set forth in the "Statement of Points upon which Appellant Intends to Rely on Appeal" made and filed on the former appeal (Cause No. 10870 in the Circuit Court of Appeals for the Ninth Circuit) and found on page 120 of the printed record of transcript on that appeal, which, briefly reiterated, are:

(a) It is a condition precedent to the exercise of the power of eminent domain at the instance of an officer of the United States that Congress expressly grant the power to such officer or authorize him to procure for public uses the property sought to be condemned.

(b) None of the Declaration of Taking filed herein disclose the prerequisite grant of power or authority, and in fact both were wholly wanting.

(c) The order of the District Court of November 12, 1943, is *res adjudicata* as to the absence of the prerequisite [102] power or authority under the statutes set out and relied on in the first and second Declarations of Taking.

(d) The United States by pleading over acquiesced in and is bound by the order of November 12, 1943, as to the absence of power under the statutes set out in and relied on under the first and second Declarations of Taking.

(e) The District Court was without jurisdiction in a subsequent term of that court to vacate or modify its order of November 12, 1943.

(f) The third Declaration of Taking filed November 12, 1943, does not disclose any grant of power or authority to exercise the power of eminent domain and in fact both were wholly wanting.

(g) The District Court erred in that portion of the judgment entered May 23, 1944, on the Declaration of Taking filed November 12, 1943, insofar as it purported to confirm a possession taken by the United States on or about February 5, 1942.

(h) That in any event there is no power or authority in the Secretary of Agriculture or the Under-Secretary of Agriculture to procure or acquire the lands designated as Tracts Two and Three.

2. If there has been any valid taking of appellant's property, which is denied, it was in no event prior to the filing of the third Declaration of Taking on November 12, 1943, and accordingly the District Court erred, to the prejudice of appellant:

(a) In its order of September 24, 1945, fixing October 22, 1943, as the date of valuation.

(b) In instructing the jury:

“You are instructed as a matter of law that it (the Government) acquired fee simple title to the property on October 22, 1943.” [103]

3. There was in any event no valid taking of Tracts Two and Three because there was no evidence that said property was used or useful for the proposed purpose for which taken.

4. That in determining the value of or compensation to be paid for property taken by eminent domain the property is to be valued with reference to the uses to which it has been applied and its capacity for other uses, including its special availability or adaptability for the use for which it is taken, and accordingly the District Court erred, to the prejudice of appellant:

(a) In ruling and instructing the jury that in determining compensation they could not take into consideration the large stand of National Forest timber to be logged in the future and hauled out over this road or any timber owned by anyone except the appellant, or any earnings that might be derived if the property had not been taken, from the transportation of timber of the National Forest or of third parties thereover.

(b) In striking the testimony of appellant's witness McGillicudy as to market value of the property taken.

(c) In denying the offer of proof by appellant's witnesses Reynolds and McGillicudy that informed

persons in the position of prospective buyers and sellers negotiating for this property would have taken into consideration and given value to the property taken because of the reasonable prospect that the timber in the Olympic National Forest would be sold to private loggers and in all probability would be moved to market over the property sought to be condemned, and that such loggers would pay the reasonable value of the use of the road for that purpose. [104]

(d) In sustaining objections to the opinion of Mr. Hobe as to the market value of the property being condemned, taking into consideration the Government-owned timber in the Olympic National Forest to the north, and to his opinion as to such market value, excluding from consideration the Government-owned timber but including privately-owned timber within the Olympic National Forest to the north of the roads under condemnation, and in denying the offer of proof by said witness that the market value of the property under condemnation, taking into consideration that it provides the practicable route for the removal of approximately one and one-half billion feet of timber in the Humptulips watershed of the Olympic National Forest, that the Forest Service contemplated and it was a reasonable expectation that said timber would be logged at the rate of twenty million board feet per year and that another road into that timber could be built but would be more expensive to construct and operate, and all other factors which in his opinion would be

given consideration by informed buyers and sellers, was \$300,000.00.

(e) In refusing the testimony of appellant's witness Forrest as to the use to be made by the United States Forest Service of the roads under condemnation, and in refusing to admit in evidence the instrument marked for identification "Respondent's Exhibit A-14", and denying the offer of proof by said witness that the United States Forest Service planned and proposed to sell for cutting and removal by means of the road under condemnation not less than twenty million board feet per year of timber in the Humptulips River watershed. [105]

(f) In refusing appellant's requested Instructions Nos. 3, 9 and 13.

Dated this 15th day of April, 1946.

L. B. DONLEY,  
F. D. METZGER,  
METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Appellant,  
Polson Logging Company.

[Endorsed]: Filed April 15, 1946. [106]

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[Title of District Court and Cause.]

STIPULATION RE RECORD ON  
APPEAL

Whereas, Polson Logging Company, one of the respondents herein, did heretofore on March 18,



1946, give notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on December 19, 1945, and from the whole and every part thereof and for greater certainty also appealed from the Judgment on the Declaration of Taking entered May 23, 1944, and has served and filed its designation of the record on appeal, dated April 15th, 1946, together with its statement of the points upon which it intends to rely upon said appeal; and

Whereas, Items 1 to 27, inclusive, of said designation the record on appeal are identical with the correspondingly numbered items of the designation of the record on a former appeal dated July 15, 1944, which were on September 6, 1944, certified by the Clerk of the above entitled court as part of the record of Polson Logging Company's appeal from the judgment entered May 23, 1944, on the Declaration of Taking and forwarded to said Circuit Court of Appeals for the Ninth Circuit; and

Whereas, Item 28 of the designation of the record on appeal dated April 15, 1946, is identical with the additional matter designated by the United States of America to be contained and [107] which was contained in the record on the former appeal; and

Whereas, the record on said former appeal is now on file in and has been printed as the transcript of record in cause No. 10870 of the records of said Circuit Court of Appeals, and the duplication thereof in the record of the appeal now pending is deemed unnecessary;



It Is Stipulated and Agreed by and between the undersigned attorneys of record and counsel for Polson Logging Company, respondent-appellant, and the United States of America, petitioner, appellee, respectively, that the transcript, together with the original reporter's transcript of proceedings of October 29, 1943, November 6, 1943, and May 19, 1944, and the original condensed statement of testimony certified by the Clerk of the above entitled court September 6, 1944, as the transcript of the record on appeal from the judgment entitled "Judgment on Declaration of Taking" made and entered on May 23, 1944, shall, to the extent of Items 1 to 28, inclusive, constitute part of the record on the appeal of Polson Logging Company pursuant to notice of appeal dated March 16, 1946, and need not be reproduced therein but may be certified as part of such record by reference to the record on the former appeal.

Dated this 15th day of April, 1946.

/s/ L. B. DONLEY,

/s/ F. D. METZGER,

/s/ METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Polson Logging Company,  
Respondent-Appellant.

/s/ F. P. KEENAN,

Attorney for United States of America,  
Petitioner-Appellee.

[Endorsed]: Filed April 15, 1946. [108]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

Appellant, Polson Logging Company, hereby designates the following as the portions of the record, proceedings and evidence in this cause to be contained in the record on appeal, namely:

1. Certified copy of the letter of the Secretary of Agriculture to the Attorney General of the United States, filed January 21, 1942.

2. The petition in condemnation filed January 21, 1942.

3. The declaration of taking, with map attached, executed by the Secretary of Agriculture January 10, 1942, and filed herein January 21, 1942.

4. The judgment of the District Court on said declaration of taking, made and entered herein January 23, 1942.

5. The Clerk's certificate as to the deposit of \$8,280.00, filed January 23, 1942.

6. The original notice and summons filed January 30, 1942.

7. United States Marshal's return of service of notice and petition on Polson Logging Company, filed February 1, 1942.

8. Motion of Polson Logging Company to vacate the judgment on the declaration of taking entered Jan. 23, 1942, which motion was filed February 21, 1942. [109]

9. The demurrer, motion to dismiss and to strike, of Polson Logging Company, filed March 30, 1942.

10. Certified copy of the letter of the Secretary of Agriculture, dated April 21, 1942, to the Attorney General of the United States, filed October 22, 1943.

11. Amended petition in condemnation filed October 22, 1943.

12. The declaration of taking, with map attached, executed by the Secretary of Agriculture April 21, 1942, and filed herein October 22, 1943.

13. Motion of Polson Logging Company to quash the declaration of taking filed October 22, 1943, which motion was filed November 6, 1943.

14. Order entered November 12, 1943, adjudging the declarations of taking dated January 10, 1942, and April 21, 1942, and filed January 21, 1942, and October 22, 1943, respectively, unauthorized and of no effect, and quashing the judgment entered on the first of said declarations of taking.

15. The declaration of taking, with map attached, executed by the Under-Secretary of Agriculture November 2, 1943, and filed herein November 12, 1943.

16. Certified copy of letter of the Under-Secretary of Agriculture to the Attorney General of the United States dated November 2, 1943, and filed herein November 15, 1943.

17. Motion of Polson Logging Company to quash and adjudge null and void the declaration of taking filed November 12, 1943, which motion was filed November 24, 1943.

18. Second amended petition in condemnation, lodged May 1, 1944, and filed May 23, 1944.

19. Motion of the United States for the entry of judgment [110] on the declaration of taking filed November 12, 1943, which motion was filed May 5, 1943.

20. Order granting petitioner's motion for judgment on the declaration of taking, denying respondent Polson Logging Company's motion to quash, entered May 23, 1944.

21. Polson Logging Company's proposed order granting petitioner's motion for judgment on the declaration of taking filed November 12, 1943, with the Court's refusal thereof and allowance of exceptions, filed May 23, 1944.

22. Exceptions of Polson Logging Company to the order granting petitioner's motion for judgment on the declaration of taking filed November 12, 1943, which exceptions were allowed and filed May 23, 1944.

23. Judgment entered May 23, 1944, on the declaration of taking filed November 12, 1943.

24. Exceptions of Polson Logging Company to judgment on the declaration of taking entered May 23, 1944.

25. All Clerk's journal entries relative to proceedings had and judgments made and entered in the above entitled cause including, but not limited to, the journal entries for the following dates: January 23, 1942; March 30, 1942; April 11, 1942; May 4, 1942; June 8, 1942; June 22, 1942; July 7, 1942; August 3, 1942; August 17, 1942; September 14, 1942; October 19, 1942; February 2, 1943; October 22, 1943; October 25, 1943; October 29, 1943; November 6, 1943; November 12, 1943; May 1, 1944; May 19, 1944; May 23, 1944. [111]

26. Appellant's condensed statement of the evidence and proceedings at hearings had herein October 29, 1943, November 6, 1943, and May 19, 1944, two copies of which, together with two copies of the reporter's transcript of such evidence and proceedings are filed herewith.

27. Petitioner's Exhibit No. 1 and Respondent's Exhibit No. A-1 referred to in said condensed statement of evidence and proceedings and admitted in evidence November 6, 1943.

28. Order granting leave to amend declaration of taking, filed June 7, 1944.

29. Mandate from Circuit Court of Appeals for the Ninth Circuit, filed June 29, 1945.

30. Motion for order amending declaration of taking and subsequent pleadings, filed September 18, 1945.

31. Order amending declaration of taking and subsequent pleadings, filed September 20, 1945.

32. Exceptions of Polson Logging Company to order amending declaration of taking, filed September 20, 1945.

33. Motion of Polson Logging Company to quash and declare void the declaration of taking filed November 12, 1943, and to vacate the judgment thereon entered May 23, 1944, which motion was filed September 20, 1945.

34. Order fixing date of valuation, with exceptions thereto, filed September 24, 1945.

35. Order filed November 12, 1945, denying Polson Logging Company's motion to quash declaration of taking and to vacate judgment entered thereon.

36. Answer of Polson Logging Company to second amended petition in condemnation, filed November 12, 1945. [112]

37. Petitioner's requested instructions.

38. Polson Logging Company's requested instructions.

39. Verdict.

40. Polson Logging Company's motion for new trial.

41. Order denying motion for new trial.

42. Judgment on verdict, with exceptions of Polson Logging Company.

43. Motion of United States to cancel check of \$6500.00.



44. Order directing cancellation of check for \$6500.000, entered January 18, 1946.

45. All Clerk's journal entries relative to proceedings had and orders and judgments made and entered in the above entitled cause subsequent to May 23, 1944, and including but not limited to the journal entries for the following dates: June 29, 1945; September 8, 1945; September 18, 1945; September 20, 1945; September 24, 1945; November 12, 1945; November 13, 1945; November 14, 1945; November 19, 1945; November 20, 1945; December 3, 1945; December 17, 1945; December 19, 1945; January 18, 1946.

46. Appellant's condensed statement of the evidence and proceedings at the trial on the issue of compensation had herein November 12, 13, 14, 19 and 20, 1945, two copies of which, together with two copies of the reporter's transcript of such evidence and proceedings are filed herewith.

47. All exhibits of both petitioner and respondent admitted in evidence on the trial and referred to in the reporter's transcript of the evidence and appellant's condensed statement of the evidence at such trial. [112]

48. Notice of appeal, filed March 18, 1946.

49. Bond for costs on appeal, filed March 18, 1946.

50. Order extending time for docketing appeal and time for serving and filing appellant's desig-

nation of the record on appeal, entered March 18, 1946.

51. Statement of points on which appellant, Polson Logging Company, intends to rely on appeal.

52. Stipulation re record on appeal, filed April 15th, 1946.

53. This designation of contents of record on appeal.

Dated this 15th day of April, 1946.

L. B. DONLEY,

F. D. METZGER,

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Appellant,  
Polson Logging Company.

The undersigned, attorneys for the United States of America, hereby acknowledge receipt of copy of the foregoing designation of contents of record on appeal and of the statement of points on which the appellant intends to rely on appeal, being Item No. 51 in said designation.

Dated this 15th day of April, 1946.

/s/ F. P. KEENAN.

[Endorsed]: Filed April 15, 1946. [113]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL MATTERS TO BE CONTAINED IN THE RECORD ON APPEAL

The United States of America, Appellee herein, designates the following additional matters to be contained in the record on appeal:

1. The Clerk's certificate as to the deposit of \$688.00 filed October 22, 1943.
2. The reporter's transcript of the evidence and proceedings of the trial on the issue of compensation had herein on November 12, 13, 14, 19 and 20, 1945, two copies of which appellant has heretofore filed.

Dated at Seattle, Washington, this 19th day of April, 1946.

/s/ J. EDWARD WILLIAMS,

/s/ F. P. KEENAN,

Attorneys for United States  
of America, Appellee.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 22, 1946. [114]

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[Title of District Court and Cause.]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated by and between the United States of America, Petitioner, and Polson Logging Company, Respondent, by and through

their respective undersigned attorneys, that all of the original Exhibits which were offered and received in evidence or offered but not received because of objections thereto were sustained, consisting of Petitioner's Exhibits 1 and 2, which are maps, Petitioner's Exhibits 3 and 6 to 17, inclusive, which are photographs, and Petitioner's Exhibit 18, which is a map, and Respondent's Exhibit A-2, which is a map, Respondent's Exhibits A-3 to A-11, which are photographs, Respondent's Exhibit A-12, which is a map, Respondent's Exhibit A-13, which is a summary or estimated cost of production new, and Respondent's Exhibit A-14, which is a letter from the United States Forest Service to Polson Logging Company, shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that an order to that effect may be entered by the above entitled Court upon the presentation and filing of this Stipulation and without other notice; and that none of said Exhibits nor any copies or reproduction thereof need be attached to or incorporated in either the Appellant's Condensed Statement of the Testimony or the Reporter's Transcript [115] of the Testimony.

Dated this 14th day of May, 1946.

F. P. KEENAN,

Of Attorneys for Petitioner,  
United States of America.

L. B. DONLEY,  
F. D. METZGER,  
METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Respondent,  
Polson Logging Company.

[Endorsed]: Filed May 22, 1946.

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[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF  
ORIGINAL EXHIBITS

Pursuant to the written stipulation of the parties  
on file herein,

It Is Ordered that the originals of all Exhibits  
offered and received in evidence or offered and  
refused, mentioned in said stipulation, to-wit: Peti-  
tioner's Exhibits 1 to 3, inclusive, and 6 to 18, in-  
clusive, and Respondent's Exhibits A-2 to A-14,  
inclusive, shall be forwarded by the Clerk of this  
Court to the Clerk of the United States Circuit  
Court of Appeals for the Ninth Circuit with the  
Transcript of Record on Appeal.

Done in Open Court this 22nd day of May, 1946.

/s/ CHARLES H. LEAVY,  
Judge.

Presented by:

/s/ F. D. METZGER.

[Endorsed]: Filed May 22, 1946. [116]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 116, inclusive, together with the original Reporter's Transcript of the Trial had on November 12, 13, 14, 19 and 20, 1945, the original Condensed Statement of Testimony and the record heretofore certified which was printed as the Transcript of the Record in Cause No. 10870 of the records of the Circuit Court of Appeals and which is included in and made a part hereof by this reference pursuant to Stipulation of the parties filed April 15, 1946, is a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 323, United States of America, Petitioner-Appellee vs. Polson Logging Company, a corporation, Respondent-Appellant, as required by Appellant's Designation of the Contents of the Record on Appeal and Appellee's Designation of Additional Matters to be Contained in the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from that certain judgment of the United States District Court for the Western District of Washington, Southern Division, [117] entitled "Judgment on the Verdict," filed December 19, 1945, and also from that certain judgment of the said District Court entitled "Judgment on the Declaration of Taking," filed May 23, 1944, to the



United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Reporter's Transcript of the Proceeds and Trial had on November 12, 13, 14, 19 and 20, 1945, in two volumes, consisting of pages numbered 1 to 547, inclusive, and the original Condensed Statement of Testimony, consisting of pages numbered 1 to 148, inclusive, and original exhibits, numbered as follows: Petitioner's 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, and Respondent's A-2 to A-14, inclusive, are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, and the said fees and charges have been paid in full by the Appellant herein, to-wit:

Appeal fee .....	\$ 5.00
Clerk's fee for preparing Transcript of the Record on Appeal .....	16.50
	—————
	\$21.50

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 25th day of May, 1946.

[Seal]                   MILLARD P. THOMAS,  
                                  Clerk.

By /s/ E. E. REDMAYNE,  
                                  Deputy. [118]

In the District Court of the United States for the  
Western District of Washington, Southern Division

No. 323

UNITED STATES OF AMERICA,

Petitioner,

vs.

POLSON LOGGING COMPANY, a corporation,  
et al.,

Respondents.

Be It Remember that on the 12th day of November, 1945, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Southern Division, in the city of Tacoma, and state of Washington; the Petitioner appearing by F. P. Keenan, Special Assistant to the Attorney General, and Anthony L. Stella, Special Attorney, Department of Justice, and the Respondents being represented by F. D. Metzger and A. E. Blair, of Metzger, Blair & Gardner; both sides being ready for trial, a jury was duly empanelled; and

Whereupon, the following proceedings were had and done, to-wit:

Mr. Stella: We have a formal Order here in which the Court denied the respondent's motion to dismiss, and strike, and the demurrer to our peti-

tion, which I believe at this time should be entered. Mr. Metzger has been served with a copy of it.

Mr. Metzger: The Order was served some time ago, and at my request presentation was delayed until this morning, your Honor. I have no objection to the form of the Order. I would like the exceptions to be a little more specific—the exceptions as entered in the Order, it says it excepts to the foregoing Order. I would like to take exception to have them noted to each and every subdivision of the Order.

The Court: The record will show that you have made such a request and it will be allowed.

Mr. Stella: And, if the Court please, at this time I would like to move to strike the answer of the respondent, Polson Logging Company, which they have this day filed and served on the Government. No pleading is necessary in a condemnation case, and also for the reason the answer has not been timely served.

The Court: It is not necessary to file an answer in a proceeding of this kind, and if an answer is to be considered, there might be some issue as to [1\*] whether it has been timely filed, but I do not think that I shall pass upon that motion at this time. I see no necessity for passing on it now. I would want to consider it a little farther before I granted your motion to strike it, but I do not want the respondents to be misled, without having—the Court having an opportunity to pass upon this as to the

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\* Page numbering appearing at foot of page of original Reporter's Transcript.

legality if they are going to offer affirmative evidence that supports these various allegations that are set forth herein, because that would become a question entirely whether it is competent evidence or not.

Mr. Metzger: I think the answer, so far as affirmative matter, is only questions of law. The answer is filed, your Honor, because of the Circuit Court of Appeals said the respondents may raise these questions by its answer, and because the Circuit Court of Appeals might construe that we were waiving those points of law without raising them in an answer. By their decision, we simply are trying to preserve the record on legal points by setting them up in the answer. That is all. There is no factual affirmative matter.

The Court: I think in view of that statement I will deny your motion to strike the answer. The answer is not going to the Jury anyway, and allow you an exception. [2]

Mr. Stella: We will take an exception to that, your Honor.

The Court: Now, it is time for the morning intermission, before we actually commence the taking of testimony, and our recesses will usually be about fifteen minutes, and there will be one in the middle of the morning and one in the middle of the afternoon and our noon intermission will be an hour and a half to two hours depending on the progress we are making on the trial of the case.

I am going to give you certain admonitions that

I shall expect you to follow very carefully, because by following them no difficulties can arise at all. By failing to follow them, there may be situations that arise unduly and improperly reflect upon the whole jury. No juror must discuss with his fellow juror any matter in connection with this case until it is finally submitted to you, because, you have taken an oath when you qualified here that you are going to try this case on the law as the Court gives it to you, and the evidence as you hear it, so if you have entered into a discussion with a fellow juror at any one of these intermissions, or any other time, you and he might gather certain facts or come to certain conclusions and inferences that the other ten did not, and you see, [3] that is the reason for that rule.

The rule further provides that you must not discuss with anybody, the witnesses or parties, or any other—anything in connection with this case, and await your final decision until after the case has been tried fully, and arguments have been made, and the Court has instructed you. Then you are at liberty to discuss it at any length you wish. To wilfully violate the admonition that I have just given you, if course, subjects you to punishment by the Court, because it would be a contempt of Court.

If any one comes to you and tries to talk to you about the case, it is your duty to tell them that you are a juror in the case and not at liberty to discuss it. If they insist upon it, it is your duty to report the matter to the Court, and then they will be dealt

with according to law. Now, in many court rooms we have a special room for the jurors so they will not be placed in the embarrassing position of some one even incidentally coming up and trying to say something to you. We do not have that situation here, so each of you will have to look after yourselves and see that you do not unconsciously or consciously violate this mandate, and that your minds are kept free and open. [4]

There may be some further instructions along this line that the Court will feel inclined to give to you.

I am going to suggest this to you, too; I cannot allow you to take notes, so you will have to give very close attention, and of course, the case will be argued on either side, and the Court will instruct you on the law on it, and I further am going to advise you that it is an unwise thing for jurors when sitting in the jury box when Court is in session, to carry on any conversation, however innocent it may be as between themselves, and the fellow at their right or to their left, or in front of them or behind them, because a whispered conversation carried on while court is in session rather distracts from the Court proceedings, and it might develop a suspicion in the minds of some of the parties, either representing one side or the other, and it might lead to a comment to a juror by a fellow juror that "I don't believe that witness" or "I am not inclined to believe that witness." For that reason I am going to suggest that you refrain from conversation and I am going to advise you that



you have the burden of listening closely to what takes place so you can charge your memory with what the evidence was when it comes time to discuss it, and with this somewhat extended [5] admonition I am going to excuse for a fifteen minute recess.

(Recess.)

The Court: Now, you may proceed, Mr. Keenan.

Mr. Keenan: If the Court please, the Government takes the position in this case that the burden of proof, and the burden of going forward, is on the respondent, and our authority being United States ex rel T.V.A. versus Powelson, 319 U. S.; 266; Westchester County Park Commission versus the United States, 143 Federal 2nd; 688, the United States versus Harrel; 133 Federal 2nd; 504.

The Court: Will you give me that first citation? You are citing one in the District of Columbia, I take it?

Mr. Keenan: The first one is, 319 United States; 266, and 87 Law Edition; 1390.

The Court: Now, what is the one in the Eighth Circuit?

Mr. Keenan: The one in the Eighth Circuit is 133 Federal 2nd; 504.

The Court: Yes, and I think I shall have to ask for the Second Circuit case. [6]

Mr. Keenan: 143 Federal 2nd; 688, 1944. I might say, your Honor, I know of no other cases discussing this or mentioning it—the Federal condemnation cases.

The Court: Unless these cases—and I shall examine them in the next intermission, would clearly hold that the general rule of state practice prevails in condemnation cases and issues such as you raise here, I shall take the position that the burden—that it is necessary that the Government present its case in the first instance as to the value. The respondent to present their case, and if any new issues are raised, or any matters that properly fall under rebuttal on this matter of fixing value the Government shall have an opportunity to offer such evidence in rebuttal, and I take your statement to be in the nature of a motion that the Court now rule upon the issue you raise, and I shall have to rule against you and allow you an exception and direct that you proceed.

Mr. Keenan: May it appear also on the record that by proceeding we are not in any way waiving the motion.

The Court: If there is merit in it you may raise it in the Appellate Court.

Now, you desire to make a statement. I am [7] going to suggest to counsel on both sides that if there are plats and maps and things of that nature, that during the intermission, so far as possible, they should be posted on the board and we can save the time and inconvenience.

Mr. Keenan: The Court may recall in this case that we had some controversy as to the proper date of valuation, and I believe an Order has been entered here that the proper date is October 22, 1943.

The Court: That is the day when the fee simple title was taken.

Mr. Keenan: And I assume that the Government in going forward to its testimony, is using this date and may it be understood we have a continuing objection and exception.

The Court: Yes. You mean, you have an objection to going forward, not to the date?

Mr. Keenan: No, I mean throughout the objection will run throughout the trial when we use that date. We are going to use that date. I assume that is the only thing we can do as a practical matter.

The Court: And it is your position that the value is at an earlier date rather than the value as of that date?

Mr. Keenan: Not necessarily. I do not know frankly.

The Court: Very well, it would depend on what tack the case would take.

Mr. Keenan: May I proceed?

The Court: Yes.

Mr. Keenan: May it please the Court, and Gentlemen of the Jury:

This is a——

The Court: I am just wondering if that could not be moved out somewhere. I think some of the jurors will have a great deal of difficulty to see that where it is. Better move it out over here. (Re-

ferring to easel). Counsel can sit on the other side of the counsel table.

Now, the jurors can see that better.

Mr. Keenan: This is a regular Government map, put out by the Forest Service, and this area in here (indicating) is a portion of the Olympic National Forest. These lines in red represent the property taken in this case—that is which the United States has taken, and this was originally a railroad logging grade in which the steel had been removed. It had been used, or a portion of it at least, for truck logging thereafter, and there are, in addition to it, there is an addition to this [9] right-of-way which is a hundred feet wide, two small parcels of land were taken here that together contained—I believe it is a hundred acres. We will have a large map of course, and I assume that the other side, the respondents—the landowners, will have a larger map also, showing this area blown up.

Aberdeen is down here (indicating) and I am not sure what the distance is. I think it is something like 25 or 30 miles. It will be your function to determine the value of the land taken.

We will present evidence to the length of this roadway taken, the condition it was in when taken, the condition of the bridges on that railroad, and there were seven; the nature of the ground around this—adjacent to this road. I might say now, it is practically cut-over land about that road. Of course, we will introduce our evidence as to value.

It will be the Government's contention that when this road was taken and set up as a highway, it in fact benefitted those cut-over lands through which it ran, and the Polson Logging Company was benefitted rather than hurt by this taking.

I think this just covers the situation. I am not allowed to do any more than outline the [10] Government's testimony at this point.

Shall we proceed now, with the taking of testimony, your Honor?

The Court: Yes. You had better Mr. Keenan, advise the clerk the order in which you want these exhibits marked. You should advise the Court as to the order in which you want these exhibits marked.

Mr. Keenan: I would like to have the one on the board now, marked Petitioner's Exhibit 1 for identification.

The Court: Is there any objection to the introduction of it Mr. Metzger?

Mr. Metzger: Not exhibit 1, no.

(Whereupon, map referred to was then received in evidence and marked Petitioner's Exhibit #1.) [11]

J. M. RANDS,

produced as a witness on behalf of the Petitioner, after first being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Mr. Rands, your full name?

A. J. M. Rands.

Q. Where do you reside, Mr. Rands?

A. Portland, Oregon.

Q. And what is your occupation?

A. I am a construction engineer, in the Forest Service.

Q. And the regional office of the Forest Service is in Portland, is it not?      A. That is right.

Q. Are you attached to the regional office?

A. Yes, sir.

Q. Will you tell us briefly what experience you have had as an engineer? Start in at the time you were in college. Did you study engineering in college?

A. Two years, 1911 to 1913, Washington State.

Q. And will you tell us just briefly about your life from 1913 to date, insofar as it has any bearing on your work as an engineer?

A. Well, in 1916—'15, '16, I was with Bannick Engineering [12] Company, Pocatello, Idaho.

Q. Speak up so that the jurors can hear you, Mr. Rands, please.

A. And Union Pacific Railroad.

'17 to '19, I was with the 23rd Engineers, A. E. F.



(Testimony of J. M. Rands.)

'20, I was with the Southern Pacific Railroad as an official engineer.

'21 to '25, I was with the Portland General Electric Company as a resident engineer, and assistant superintendent of construction of hydraulic electric development.

'26, I was with the Puget Sound Power and Light Company.

'27, I was with the Elwood Trimble, Terminal Company on Dock Street, in Portland

'28 to—'29 with the Public Works Engineering Corporation—Field Engineer, Municipal Water Developments.

'30 and '31, with the Department of Commerce, and Army Engineers as a field engineer inspector.

'32 to date, I have been a construction engineer for the Forest Service.

Q. Now, are you familiar, Mr. Rands, with the property that was taken in this case by the United States? [13]      A. Yes, sir.

Q. And I refer you to the map which is now on the easel, and marked Petitioner's Exhibit No. 1 for identification. Will you tell us just exactly what that map is—what it represents?

A. Well, that is a standard Forest Service map, which shows the Olympic National Forest lands, and the Olympic National Park and adjoining lands in the Olympic Peninsula.

Q. Now, is that map, exclusive of the lines put in, in red in the lower left hand portion, does that

(Testimony of J. M. Rands.)

map represent a standard government publication?

A. That is right

Q. That is regularly furnished to members of the public, is it? A. Yes, sir.

Q. By the Forest Service? A. Uh-huh.

Q. Will you explain to the—what those lines in red are, in the lower left-hand corner?

A. That represents the lines that are the roadway—abandoned logging grade and land that has been taken in this declaration of taking.

The Court: You have got to speak a little louder, because I am having difficulty in hearing you, [14] and I think the jury will, too.

A. That represents the lands that have been taken in this declaration of taking.

The Court: I think you had better get down there and point it out. Go ahead and point out the place.

A. This is the roadway here (indicating), you see, and then there are a couple of tracts beyond, besides the abandoned logging grade. That is, they are all in this declaration of taking.

Q. Did you put those lines on that map?

A. They were put on under my supervision.

Q. Do they—those lines that were added in red, do they correctly depict the property taken in this case? A. Yes.

Mr. Keenan: At this time the Government offers in evidence Petitioner's Exhibit No. 1.

The Court: It has been admitted. It has been admitted on stipulation.

(Testimony of J. M. Rands.)

Mr. Keenan: Sorry, I did not understand.

The Court: You may take the stand.

Mr. Keenan: You will pass your Exhibit to the bailiff and the bailiff will pass that to the witness, and we will follow that rule throughout the case.

Mr. Keenan: I beg your pardon, Your Honor.

Q. The Bailiff has just handed you Petitioner's Exhibit No. 2 for identification. Will you tell us what that is, Mr. Rands?

A. Well, yes, this is a map showing the various lines, the abandoned logging grades that were in this declaration of taking.

The Court: Speak a little louder.

A. Also, too, additional tracts, tracts 2 and 3, on the map, is shown in green. It shows the land that was taken.

The Court: Did you desire, Mr. Keenan, to refer further to this map? Do you a little later on?

Mr. Keenan: Yes, we are going to be referring throughout the case.

The Court: Maybe you had better put it on the easel.

Mr. Keenan: I understand there was going to be some dispute as to its admissibility, possibly, is that right?

Mr. Metzger: I don't know as there is any dispute as to its admissibility. There seems to be some inaccuracies about it.

Q. Did you prepare this map, Mr. Rands?

A. No.

Q. Was it prepared under your direction? [16]

(Testimony of J. M. Rands.)

A. It was prepared under my direction.

Q. And you have checked it, have you?

A. Yes.

Q. And does it, in your opinion, correctly show the lands taken in this case?      A. Yes.

Q. And it shows the location of the bridges that were taken with that land?      A. Yes.

Mr. Keenan: At this time, the Petitioner offers in evidence, Petitioner's Exhibit No. 2, for identification.

The Court: Any objections, Mr. Metzger, or Mr. Blair?

Mr. Metzger: No objection.

The Court: I think the Bailiff had better put it on the easel.

Your record may show it was admitted, now, you may proceed.

(Whereupon, map referred to was received in evidence and marked Petitioner's Exhibit number 2.)

Q. Mr. Rands, will you step down to the board, and point out to the jury the location of the public highway there?

A. This is the public highway here (indicating).

Q. And that is designated United States Highway 101, is it?      A. That is right.

Q. Now, will you start in at the highway and trace the portion of the road that was actually taken by the Government in this case?

A. This was——

The Court: Now, step down, if you will, just

(Testimony of J. M. Rands.)

step a little to one side. This is all for the benefit of these twelve people here (indicating the jurors).

A. Well, this line here——

The Court: You will have to speak loud enough so they can all hear you.

A. (Continuing): All of these lines shown in green are the roadways, and these two tracts are the two tracts that were taken under this declaration.

Q. When you say under this declaration, you mean the tracts taken in this case?

A. That is right.

Q. And the property taken in this case was this road and these tracts designated two and three?

A. That is right.

Q. Now, there is another tract on that map, isn't there, designated tract 1?

A. It is this tract here (indicating), which was taken. [18]

Q. Well, that is a portion of the road, is it?

A. That is portion of the roadway.

Q. And are all of the bridges that are on that road indicated on that map? A. Yes.

Q. And would you point out the boundary line of the Olympic National Forest?

A. This is the boundary line shown in the hatching, along this upper side of the map.

Q. Now, this map has on it "Township 21 North, Range 9, West of Willamette Meridian." As a matter of fact, some of the property involved also is in "Township 21 North, Range 10 West, isn't it?

(Testimony of J. M. Rands.)

A. That is right.

Q. Part of the property, or part of the land shown on that map is in "Township 21 North, Range 10 West, is it not? A. That is right.

Q. Will you point out the line of—between the Range 9 West and Range 10 West?

A. This is your range 9 here (indicating). This portion being 10, and this portion (indicating), being in 9.

Q. Well, for convenience's sake I suggest that you take your pen and write in the designation 10 West there.

(Witness does as directed.)

The Court: Let me interrupt you a minute. [19]

Mr. Keenan: Is this map on the usual natural standard, the top is north?

A. That is right.

Mr. Keenan: That is right.

I think you can resume the stand, Mr. Rands.

Q. Can you tell us how much acreage there is in Tract number 2—how many acres there are in that tract? A 10 acres.

Q. And Tract 3, what is the acreage there?

A. 90 acres.

Q. Now will you tell us how long this road is—how many miles of road was taken all told, here?

A. The total is 14.43 miles.

Q. And now, on October 22nd, 1943, was there a portion of this road that went over land then not owned by the Polson Logging Company?

A. Yes.



(Testimony of J. M. Rands.)

Q. And which portion of the road was it?

A. That is section 16—should I show you?

Q. If you please.

A. It would be this one, across this section here (indicating).

Q. Section 16, in Township 20 North, Range 9 West?

A. That is right.

Q. And does your figure of 14.43 miles as the road length, [20] include the portion of the road that was in section 16?

A. No, that is excluded.

Q. In other words, the 14.43 miles represents the length of road over the Polson Logging Company's land, is that right?

A. That is right.

Q. Now, have you computed the acreage which is included in this 14.43 miles of road?

A. Yes.

Q. And what is that acreage?

A. 173.96 acres.

Q. So, all told, there is 173.96 acres in the road, and there is an extra 100 acres in tract 2 and 3, together?

A. That is right.

Q. Now, is the acreage that is in tract 1, which is the highest place in the road, is that included in your 173.96 acres?

A. That is right.

Mr. Keenan: You may cross-examine

Mr Metzger: Petitioner's Exhibit No. 2 for identification has been admitted, has it not?

The Court: Yes, one and two. [21]

(Testimony of J. M. Rands.)

Cross-Examination

By Mr. Metzger:

Q. Mr. Rands, is that correct, R-a-n-d-s?

A. That is right.

Q. Can you or will you, for the benefit of the jury, indicate on Exhibit 1 the area which is covered by Exhibit 2?

The Court: Mr. Bailiff, you will have to loosen at the——

Mr. Metzger: I think it shows here, if he has a crayon, I would like to have him outline it if possible.

The Court: Here is a pencil.

(Witness does as directed.)

A. That probably isn't too good, but that is the way it is.

Q. Well, you have indicated in a red outline on Exhibit 1, in general the area covered by Exhibit 2?

A. Yes.

Q. That is right. In other words, it embraces part of the Olympic National Forest, Exhibit 2, does, and a portion of Township 21 North, Range 9 West, and Township 21 North, Range 10 West, lying immediately south of the Olympic National Forest?

A. That is right, yes.

Q. Now, on Exhibit 1—or Exhibit 2, rather, you have said that the hatched line towards the top of the Exhibit marks [22] the south boundary of the Olympic Forest. That corresponds with the termination of the green coloring of Exhibit 1?

A. Uh-huh.

(Testimony of J. M. Rands.)

Q. A part of this green that you show as roads taken, is north of the boundary of the forest That is, however, on the land of the Polson Logging Company, is it not? A. That is right.

Q. In other words, there are privately owned lands within the Olympic National Forest?

A. Oh, yes.

Q. And this, that little piece happens to be land privately owned by Polson Logging Company in the forest? A. That is correct.

Q. Is that right? A. That is right.

Q. Now, you mentioned State Highway 101, and pointed it out as being about a mile east of the Range 9—a mile west, I beg your pardon?

A. That is right.

Q. Is that highway, if we had Exhibit 1 uncovered entirely, extends all the way from Hoquiam clear up around the Olympic Peninsula as the Loop Highway, is it not?

A. I wouldn't be sure about the number, but I know the highway goes around. [23]

Q. But, that is what is known generally as the Loop Highway that runs from Aberdeen and Hoquiam, clear around to Forks, and Port Angeles, Port Townsend? A. Yes.

Q. And that highway runs through, as shown in Exhibit 1—it runs—continues north, and runs right through the Olympic Forest in this area that I'm now indicating? A. Yes.

Q. Probably shown there?

A. Yes, it is shown there.

(Testimony of J. M. Rands.)

Q. You say that section 16, is owned by the State. Do you know that Polson Logging Company has rights in Section 16?

A. I believe I saw a right-of-way from the State to them at one time. I don't know how old or how recent it is.

Q. Well, you don't want to tell the jury—you don't want the jury to believe your statement that Polson Logging Company has no rights in section 16, then, is that right?      A. No.

Q. Beg pardon?      A. No.

Q. Now, what is the length of the road across section 16?

A. I believe it is about a mile and a tenth—about 1.1 miles. [24]

Q. Now, how did you determine the length of this 14 miles of road that you say is there?

A. That was a transit and chain survey.

Q. Did you make it?

A. No, under my supervision.

Q. It was made under your supervision?

A. That is right.

Q. Were you on the ground yourself?

A. I didn't take any part of the survey. I have been over the property, however.

Q. Actually, Mr. Rands, as indicated on this Exhibit, there was, on the date referred to October 22nd, '43, an extension of this road across the tracts 2 and 3, connecting with the—which you indicate as line "J" and the east, is that true?

A. That is right.

(Testimony of J. M. Rands.)

Q. How long is that?

A. I can't answer that.

Q. You can't answer that?           A. No.

Q. The road is the same as the rest of the road, is it not, across those tracts?

A. In what respect?

Q. Well, I mean is there any difference in the character of the road that you indicate here as—marked here as [25] line "K" and the road which crosses tract 3 and 2, and joins up with line "J"?

A. No, they are generally the same sort of a road.

Mr. Metzger: That is all.

(Witness excused.)

The Court: It is time now for the noon intermission, so we will take—and I think unless, there is some reason shown to the contrary, I shall reconvene at 1:30 and adjourn at 3:30 this afternoon, just make up the half hour at the noon hour. That will give us all an opportunity, unless you feel Mr. Keenan, by reason of your cold—you seem to be suffering from one, you are not in condition to proceed.

Mr. Keenan: No, I can make it. I am afraid I am an awful annoyance to the other people. I am not sure whether I am a source of danger or not.

The Court: Well, there is some, but it is probably remote, and so remember the admonition I gave to you at the opening—of the first intermission, and

you are now excused until 1:30, and the Court will be at recess until 1:30

(Recess.) [26]

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1:30 o'clock p.m.

The Court: Now, you may proceed.

LESTER M. EDGE,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Edge?

A. Lester M. Edge.

Q. And where do you reside?

A. Olympia, Washington.

Q. And how old are you? A. Forty-three.

Q. And what do you do for a living?

A. I am a logging engineer for the Olympic National Forest.

Q. Now, what are the duties of a logging engineer—that is, a logging engineer in the forest service?

A. Well, in my particular case I plan transportation systems for logging, for forest protection, and for administration.

I also have technical supervision of road and [27] bridge construction, and maintenance.

I also make all of the estimates for the construction costs on logging roads.



(Testimony of Lester M. Edge.)

Q. Now, when did you first start to engage in any business connected with logging or road building?

A. Well, I have been connected with it most all the working years of my life I started out in 1917. From then on, until 1924, about the time I finished High School, I worked in the woods and went to school.

Q. Did you go to college anywhere?

A. Yes, I attended the University of Montana from 1924 to 1927, and majored in Forestry.

Q. And what have you done since 1927,—tell us briefly.

A. 1927 and 1928 I worked as a draftsman for the Northern Pacific Railroad on main line railroad construction. About 1928 to 1930 I worked as a construction superintendent for the Pickering Lumber Company, and from 1930 to 1931 I was topographer for the Oregon Electric Railroad on a railroad location.

Q. What does a topographer do?

A. A topographer does field mapping along preliminary lines, and location, so that the permanent location can be accurately located in reference to the terrain. That is, take advantage of site, cuts, and fills, and flats, and what have you, and put in the best grade that is [28] possible.

Q. All right, I think we have got you up to about 1931, is that correct?      A. That is right.

Q. And then, what did you do?

A. From 1931 to 1932 I was a level man for the

(Testimony of Lester M. Edge.)

Bureau of Public Roads on road construction in Northern Iowa, and from 1932 and 1933 I drove cat for the Willamette National Forest.

Q. Caterpillar?

A. Yes, sir, tractor operator.

Q. And then what?

A. And 1933 to 1942 I was a project superintendent, and I was in charge of location, construction, and maintenance of roads and bridges, telephone lines, trails, water systems. I had charge of heavy equipment operations that did those jobs.

Q. Whereabouts?

A. Most of it was on the Willamette National Forest.

Q. Down in Oregon?           A. Yes, sir.

Q. You worked directly for the Forest Service then, or was that a C.C.C. connection?

A. Well, I worked—I was connected with the three C's, yes, but I was in the Forest Service. I was considered [29] a Forest Service employee.

Q. And did you leave that job to come up here to the Olympic—

A. Yes, sir.

Q. And how long have you been the logging engineer of the Olympic National Forest?

A. 1942 to the present.

Q. Are you familiar with the lands that have been condemned in this case?

A. Yes, sir, I am.

Q. And when did you first see those lands?

A. In October, 1942.

(Testimony of Lester M. Edge.)

Q. What was your occasion for visiting the lands?

A. I examined the roads with the idea in mind to transport timber from the Olympic National Forest on the north, to the main Olympic Highway.

Q. How many times in all have you been over this road?

A. Well, it has been pretty continuous since July, 1943, that is.

Q. When were you last there?

A. Pardon?

Q. When were you last on the road?

A. Last Sunday, about 5:00 o'clock.

Q. You mean, yesterday?

A. Yes, sir. [30]

Q. Can you tell us what condition this road was in generally when you first examined it, in October of 1942?      A. Yes.

Q. Will you please——

Mr. Metzger: I object as immaterial and irrelevant, Your Honor, please. The date is October, 1943.

The Court: Objection will be overruled and he may answer, and exception allowed.

A. Lines "A" and "B," that is the green line——

Q. Do you want to step down to the board and take the pointer?      A. I would like to, yes.

This line is line "A" and "B."

Q. I think, if you stood over here perhaps it would be better.

(Testimony of Lester M. Edge.)

A. This is line "A" and "B." Line "A" runs to about that point there (indicating on map), and line "B" is this section here (indicating on map), and then there is line "C." Line "D." Line "K," going into track "C," and coming out of track No. 2, which is line "J," and then there is a line "F," and the line "L," over here in section 1. This section in here, line "A" to that point, and then on to the end of line "B," I found was an abandoned railroad grade. At the time, it was being used as a logging road. The operator or operators—I [31] was acquainted with one. The other one I am not certain. The one I know that was logging in there was a man by the name of McKay, and I believe the other operator was M. D. Timber Company. Besides, the road was very heavily grown up with brush. Ditches—the drainage ditches along the side were full of debris, the culverts had originally been made of logs, had pretty much rotted out and had collapsed. Drainage in some places was running across the roads. Other places, the water level was very close to the surface and there was chuck holes in it.

The bridges—the first one here, was Stevens Creek Bridge. That was a log stringer. I believe it was about 150 feet long. I am not certain of the exact length, but that is very nearly the length of it. It had logged crib piers—big heavy log crib piers, and log stringers. In my estimation, the bridge was unsafe for logging traffic, and since that bridge has been replaced, and I had a chance to ex-

(Testimony of Lester M. Edge.)

amine those stringers and the abutments, and they were rotted. They were absolutely unsafe for logging traffic, although logging trucks were running over the bridge at the time.

The next bridge or trestle, rather, was known as the O'Brien Creek Bridge, or trestle. That [32] is a small creek in a rather deep wash. That particular trestle was about 80 feet above the water surface—the trestle itself. That is, the piling on the trestle were of Western Red Cedar, along with the caps, and it was in a pretty good state of preservation. However, there was two log crib approaches to that, and this approach on the north side had started to slip. It had slipped to an extent that the stringer had—or the stringers rather, on that approach, had dropped about a foot below the grade of the deck, itself. The bridge deck had been shimmed up—that structure there, in my estimation, was also unsafe for log truck hauling, for the reason that that north approach there, had started to slip. However, logs were being hauled over it.

The next bridge was across the west fork of the Humptulips. That is a pile bent structure of Western Red Cedar—that is, the bents, the piling and the caps are Western Cedar. The piling was in a fair state of preservation. In fact, they were all good with the exception of about thirteen, and some of those had either been knocked out by high water, or had rotted out, and it was necessary to replace them. At the time that I examined that bridge, I found two stringers that were definitely unsafe.

(Testimony of Lester M. Edge.)

However, I did [33] not have a very good chance to get at the rest of them. They were not very accessible, and could not examine very closely. However, that bridge has also been repaired to a certain extent—that is, those stringers that decayed have been replaced, and instead of two stringers being unsafe, there were five. The deck joists on that bridge were replaced, and the decking, and those piling—those thirteen piling have either been replaced, or they have been repaired.

The next bridge was across the dry ravine in section 16. That was just a ravine, and not very much water outside of a little drainage concerned. I think that trestle is about 138 feet long. That structure was in very good shape, with the exception of the deck joists, and the deck. They have since replaced.

Donkey Creek No. 1 crosses Donkey Creek. It is about 275 feet long, and that bridge was probably in the best shape of all of them. That is, it was in good condition, with the exception of the deck which we have repaired in a few places, and that is suitable for log hauling now.

Donkey Creek Bridge No. 2 is about—I believe it was about 75 feet long, and that bridge, with the exception of the deck, is okeh, and that has been [34] redecked, and that is the same with Donkey Creek No. 3.

Donkey Creek No. 3 is about 80 feet long, I believe. Line "C" and line "D" was an old abandoned railroad grade, and had not been used. That was pretty badly grown up with brush, and that I



(Testimony of Lester M. Edge.)

believe was opened by an operator by the name of Johnson that logged national forest timber, and it has been resurfaced and just barely usable as a logging road. That is, there isn't any turnout, and the ditches and culverts are in bad shape.

Line "F" is a part of a road system that comes down in here (indicating), and connects with this system here. There is a lookout here (indicating on map). That is known as Burnt Hill Lookout, and that road is used to administrate that lookout and to make a connection across the top here, to avoid going clear down here and coming up from here. The Forest Service has maintained that road for a number of years. It was constructed by the Forest Service. I don't know the exact date, but I think it was along in '35 or '36. This portion of this road in here (indicating) is not suitable for a logging road. This is, however (indicating).

Q. How wide is this road?

A. Well, at the present it has about a 16 foot crown. [35]

Q. What do you mean by a 16 foot crown?

A. Well, that is from the ditch to ditch.

Q. Well, is it wide enough for two cars—two trucks?      A. No, it is not.

Q. When you first saw the road, was the steel still there?

A. No, the steel had been lifted, and it was in use then as a logging road.

Q. How about ties?

A. The ties had been—they had been removed.

(Testimony of Lester M. Edge.)

Q. What is the normal life of a wooden bridge such as those, assuming that the bridge was new?

A. Well, I think about—between fifteen and twenty years. That is, there is the piling and the caps in those bridges constructed for the most part with very good quality of Western Cedar, and that type of wood will last about—from fifteen to twenty years. It varies in localities.

Q. Was there any treated material in these bridges?      A. No, no treated material.

Q. In any of the bridges?

A. Not in any of the bridges.

Q. What do you mean by “treated material”?

A. Well, treated material in my estimation is that piling and caps, and other material that has been treated with creosote. [36]

Q. Did you make any estimate for the Forest Service as to the cost of contemplated improvements to this road?      A. Yes.

Mr. Blair: If the Court please, we object to the cost of contemplated improvements, unless—I don't see it has any bearing, what improvements the Forest Service may have had in mind.

Mr. Keenan: If the Court please, if benefits are to be shown here, and I think they are admissible in this case, I think we are entitled to show the amount of money of the improvements to be made by the United States Government to the road.

The Court: Objection will be overruled and exception allowed.

(Testimony of Lester M. Edge.)

Q. Now, first, I think your answer was in the affirmative, was it not?           A. Yes.

Q. First, will you tell us, Mr. Edge, what was planned by the Forest Service to be done there with respect to this road?

Mr. Blair: We object again, Your Honor, to what the Forest Service may plan, as being wholly immaterial to this case, and certainly in this kind of a case where this property is not being taken for a public highway, there is no question of benefit to this land [37] involved.

The Court: I am assuming it was taken——

Mr. Keenan: The declaration of taking so states.

Mr. Blair: Ever since the road was taken, it has been blocked off, and blocked——

Mr. Keenan: Polson has been there with a guard.

The Court: I can only go on what the petition recites, and my recollection—I can't turn to it immediately, and if I am wrong in that I would be glad to have you——

Mr. Metzger: I think, Your Honor is incorrect in that there is no declaration of this being taken for a public road anywhere.

The Court: We had better settle that question, though I think—you have, Mr. Keenan, the reference to the petition?

Mr. Keenan: Paragraph 2 of the Amended Petition in condemnation provides that the Secretary—and similar language appears in the declaration of taking,—Secretary of Agriculture of the United States of America has determined that in his opin-

(Testimony of Lester M. Edge.)

ion it is necessary and advantageous to acquire for the United States by condemnation, under judicial process, certain lands hereinafter [38] described for the purposes described in said Acts, to-wit: Provide for the construction, maintenance and use of a highway, logging railroad, logging road, skidway and landing ground purposes, and for ingress and egress, to Olympic National Forest, over which to remove the dead, mature, and large growth of trees and timber products and other products upon and from said forest, and transportation of said timber and timber products and other products and persons and material in the administration, conservation, preservation, and protection of said forest, and prevention and extinguishment of fires therein, or adjacent thereto, and for use as a permanent highway for all said purposes, and for the use of the people of the United States generally for all lawful and proper purposes, having regard to the geographical, topographical and other conditions of said forest.

The Court: Let's proceed, the objection will be overruled, exception allowed.

Mr. Metzger: Your Honor please, before Your Honor passes on that, the taking here is exclusively for a highway, if you call it that, to the forest. It had nothing to do with the intervening lands over which it passes. There is no section—nothing in here that this is a highway for the use of [39] anybody, unless he is going to, or into the forest, or unless he is going to remove the timber from the forest. It has nothing to do, and it is not taken. It

(Testimony of Lester M. Edge.)

is used in general language. It says, "For a permanent highway for all said purposes," and said purposes are all exclusively related to something in the forest, and nothing for anything outside of the forest.

I submit, Your Honor, if you will examine the declaration of taking, in which this proceeding is based, and the second amended petition, I think it is substantially in the same form.

You will find that in the third declaration of taking—you will find this language, if I can find it now. First, before I get to that, the letter of the Under Secretary of Agriculture, addressed to the Attorney General requesting the institution of this proceeding, and showing the purposes for which it was being brought, is this:

"The lands sought to be acquired is for the purpose of construction thereon a highway, logging railroad, skidway and landing grounds, for the purpose of removing or having removed thereover, the dead, mature and large growth of trees, especially Sitka Spruce, being used in connection with the manufacture of airplanes by the Government and our allies, within the Olympic [40] National Forest, and transporting said timber from said Forest to practical points for the manufacture and marketing thereof, and for other purposes."

The instructions in the authority to the Attorney General to institute this action was to acquire a highway, to remove—and only for the purpose of

(Testimony of Lester M. Edge.)

removing timber from the Olympic National Forest, and for no other purpose.

Now, the declaration of taking says—this is the one which is now being relied upon, dated November 21st, 1943:

“The public uses for which said lands are taken are, and said lands are necessary adequately to provide for, the construction, maintenance, and use of, a highway, logging railroad, logging road, skidway, and landing ground purposes, and for ingress and egress, to Olympic National Forest, over which to remove the dead, mature, and large growth of trees, timber products, and other products upon, and from, said forest, and transportation of said timber, timber products, and other products, and persons and material, in the administration, conservation, preservation, and protection of said forest, and prevention and extinguishment of fires therein, or adjacent thereto, and for use as a permanent highway for all said purposes,”—for no other purposes—“said [41] purposes, for the use of the people of the United States, generally, for all lawful and proper purposes.” Now, listen, Your Honor—“having regard to the geographical, topographical and other conditions of said forest, and lands in the vicinity thereof, which affect the welfare, safety, and preservation of the forest.”

There isn't anything about the use for the public, outside of the forest, anywhere, and what they are relying on——

The Court: Well, the language I have here reads,



(Testimony of Lester M. Edge.)

as you gave it, and it says, "including the use of the people of the United States visiting said forest for business, health, recreation and enjoyment, as are, or may be authorized by Congress, or by executive order, or by the Department of Agriculture, not inconsistent with the administration of the forest."

Mr. Metzger: That is right, I beg your pardon, I did not go quite that far, but my point is still there, "including the use of the people of the United States, visiting said forest."

The Court: You mean, they do deny it to the lands that are contiguous to the highway?

Mr. Metzger: Yes, sir, and they haven't any authority to make a public dedication of this road to [42] the people. They are taking it for the United States for the forest purposes only, and they have no authority to dedicate it to the people. The Department of Agriculture hasn't the authority to dedicate it.

The Court: On the issue of authority, the Court is not advised. It is a matter that really should have been brought up before we went into the trial of the case, I feel.

I think I shall let this witness testify and then I will ask the Government to furnish some further authority before we close this case, because I will state now if it be a fact that the Forest Service can deny to the adjacent lands on either side the use of this highway, then the element of offsetting benefits as against them, should not be in this case.

(Testimony of Lester M. Edge.)

Mr. Keenan: I take it Your Honor does not want to hear from me now on that subject?

The Court: No, I regret, however, this issue was not raised so that I could have disposed of it, because it is a matter of no concern to the jury. It is a matter for the Court. However, I shall let this witness testify, and then shall strike from the record if I am satisfied—I think I can more expeditiously do that.

Mr. Metzger: Allow us an exception to Your [43] Honor's ruling.

The Court: Yes.

Q. What improvements did the Forest Service contemplate making to this road at the time, on October 22nd, 1943? A. They——

Mr. Metzger: If Your Honor please, I must rise again to object, because I think that question is wholly improper, what improvements the Forest Service contemplated.

The Court: Well, the question goes, I take it, as to the kind of a road they expected to build there.

Mr. Metzger: Yes, but who was the Forest Service? Is this the Department out here, or is it this Mr. Watts, this chief of the Forestry Service in Washington, D. C.?

The Court: Objection will be overruled, Mr. Metzger, and exception allowed, and we will proceed.

Q. You may answer the question.

A. The Forest Service were going to reconstruct the road according to their one and one-half lane

(Testimony of Lester M. Edge.)

minimum standard. That is a 20 foot roadbed, exclusive of ditch. They were going to clear, in addition to that, [44] on each side, beyond the shoulder, about five feet, to let in more of the sunshine, so that the roadbed would dry out. They were going to surface it sufficiently to sustain heavy logging traffic from the forest to the north.

They were going to repair, replace—repair and replace those bridges in such shape that it would sustain the amount of traffic.

Q. Now, I beg your pardon, had you finished?

A. I am through.

Q. Now, how much of that work has actually been done?

A. The Stevens Creek Bridge has been replaced, with the exception of the wheel guards have not been installed. That is a two-lane bridge, and it is 150 feet in length. It has pile—treated pile piers, Western Red Cedar caps, Douglas Fir stringers, and Douglas Fir planking for the deck.

The O'Brien Creek Bridge, or trestle, has been replaced with a large re-enforced concrete culvert. It has two openings, six by eight feet, and is 155 feet in length, and there has a fill been put across there, containing about—over 16,000 cubic yards.

The west forks of the Humptulips Bridge, the bad stringers—the five stringers have been replaced. Those piling that were bad, or needed replacing, were [45] replaced. Those that could be repaired were repaired. There were about thirteen in all. Sway bracing has also been repaired on that bridge.

(Testimony of Lester M. Edge.)

However, the wheel guards have not been put in yet.

Dry Ravine Bridge has been redecked. Wheel guards are not on that one.

Donkey Creek Bridge No. 1 has just been repaired in a few spots where there has been broken or decayed deck planking.

Donkey Creek Bridge No. 2, the deck has been replaced—deck and the deck joists, and: .

Donkey Creek Bridge No. 3 has been—deck joists have been replaced and the deck also has been replaced. There has been some spot graveling the full length of the road, in places that had started to break through.

There has been a small amount of brushing done on the sides, and that is about all that has been done.

Q. What was the cost of replacing Stevens Creek Bridge, and furnishing—putting in the fill and the culvert in the place where the O'Brien Creek Bridge, or trestle, was?

A. Stevens Creek Bridge cost about \$5,000.00. I believe it was between \$4,500.00 and \$5,000.00—the exact [46] figures are in the office of the Olympic National Forest in Olympia.

On O'Brien Creek, the culvert cost a little over 29,000 yards. That culvert there contained 420 cubic yards of Class A concrete. It has 26 tons of reinforcing steel in it, and a little over 16,000 cubic yards of compacted fill. There is a large cut on either end of that job there, and it necessitated surfacing of about a quarter of a mile of the road there, and it was necessary to put in about a thou-

(Testimony of Lester M. Edge.)

sand yards of surfacing. That is pit run surfacing on it.

Q. You refer to some figures, something slightly in excess of 29,000. What were you referring to, yards? A. \$29,000.00.

Q. \$29,000.00? A. Yes, sir.

Q. And that is the approximate amount expended by the United States Government on the O'Brien Creek Bridge or trestle?

A. That is right.

Q. And do you know how much has been spent in repairing these other bridges?

A. There has been about \$4,000.00. It would be rather difficult to give the exact figures that was expended on each one of those structures, but altogether there [47] was a little over four thousand. Now, that did not include about 25,000 board feet of 4 x 12 planking that was cut last winter by the army engineers, in the course of their training. That is not included in that figure.

Q. What is your figure again?

A. About 22,000—22,000.

Mr. Metzger: 22,000 what?

A. Board feet of planking.

The Court: But, in dollars, what is it in dollars?

A. Well, I think that type of planking cost about \$44.00 a thousand.

Q. How much—have you an estimate as to all the money that the Forest Service has spent so far in improving this road? A. Yes.

Q. How much is it?

(Testimony of Lester M. Edge.)

A. It is a little over \$38,000.00.

Q. That includes the road as well as the bridges?

A. That included all the work that has been done on that road.

Q. And have you made an estimate as to the total cost to the Forest Service, of the improvements that are contemplated as you have testified to a few moments ago?      A. Yes, sir.

Q. What was your estimate?

A. On lines "A" and "B"—now, these are total costs, including what has been spent. Lines "A" and "B" for the bridgework, the surfacing and clearing, replacement of culverts, improving drainage, I estimated it would cost about \$66,577.00.

Lines "C," "D," "F," "L," "J" and "K," I estimated it would cost about \$20,933.00.

Total betterment costs for all roads, involved in this order of taking would cost, I estimate, \$87,510.00, and I have the actual funds spent to date, Forest Service funds spent to date on lines "A" and "B," which is all funds that have been spent, is \$38,178.00, and total uncompleted work that was contemplated on work, costing \$49,340.00.

Q. What is that last figure?

A. \$49,340.00.

Q. Did you view these bridges some time close to October 22nd, 1943?      A. Yes, I did.

Q. Speaking as of that date, and assuming that none of the bridges have been replaced or repaired at that time, what, in your opinion, would have been the life span in [49] terms of years or remain-



(Testimony of Lester M. Edge.)

ing life span of the Stevens Creek Bridge, and that——

A. That was nil. That bridge was unsafe for any type of traffic.

Q. What would you say as to the O'Brien Creek Bridge, or trestle?

A. O'Brien Creek Trestle was unsafe until extensive improvements would have been made there to that north approach.

Q. What would you assume the life to have been, speaking as of October 22nd, 1943?

A. About five years.

Q. That is O'Brien Creek Bridge?

A. That is O'Brien Creek.

Q. You mean, it would last five years with or without the improvements?

A. With the improvements.

Q. Actually, the bridge was torn down, was it not?

A. Yes, sir, the bridge was removed, and this culvert replaced, because we felt that the money that would be expended—the amount of money necessary to be expended to improve it might just as well be put into a permanent structure.

Q. How long would the bridge have lasted if there had been no improvements? What would its life have been? [50]

A. That would have depended very much on the weather during the following winter. It was my opinion that the next rainy season, that that north approach would have slid out.

(Testimony of Lester M. Edge.)

Q. And did you form any opinion—have you, again speaking as of October 22nd, 1943, as to the remaining life in terms of years of the West Forks Humptulips and the Dry Ravine, and the Donkey Creek Bridges 1, 2 and 3, October 22nd, 1943?

A. There are piling, and caps, and stringers, with the exception of the five that were replaced in the West Humptulips Bridge, all those structures have in my estimation, of about 1943, would have lived about six or seven years.

Mr. Keenan: I think you may cross-examine.

#### Cross-Examination

By Mr. Blair:

Q. Mr. Edge, you say that as the engineer of the Olympic National Forest, you plan roads for fire protection and administration, as well as logging?

A. Yes, sir.

Q. Is that correct, and in any forest, irrespective of the age of that particular forest, it is necessary to have roads for the purpose of administration and fire [51] protection of the forest?

A. Yes, sir.

Q. Now, in rebuilding bridges, particularly that of O'Brien Creek Bridge, which you said might have had a remaining life of five years, but you determined to rebuild it now. You rebuilt that bridge for heavy logging traffic, didn't you?

A. Yes, sir.

Q. And that is for the purpose of removing the timber in the Olympic National Forest to the north of these roads that are being taken?

(Testimony of Lester M. Edge.)

A. Well, for timber removal, and as I said, fire protection, administration. I don't remember whether I mentioned recreation or not, but they have in mind quite a recreational development along the West Humptulips River. In fact, at the present time in Section 20, and that road that is going that way, there is a center strip being left 200 feet on either side of the logging road, so that culvert—it was not a bridge, the O'Brien Bridge was a big culvert and fill—it wouldn't really make any difference, the construction there after it was put in, it would sustain any traffic, not necessarily logging alone.

Q. And it is the purpose then to put in a recreational facility there in Section 20? [52]

A. Not exactly a facility. It is just to improve the scenic values, or aesthetic values along the road by leaving that 200-foot strip on either side.

Q. I thought you said that was going to be a recreational facility?

A. I said it was the road that is being developed up the West Forks of the Humptulips, with the idea of recreational facilities in mind. The chances are—it is possible for the Forest Service to develop camp grounds. That is, they build tables and fireplaces and sanitary facilities at certain spots that will be likely to be enjoyed by fishermen or recreationists or hunters or anybody out over a weekend, that wants to get out in the forest. That is a development of their own.

(Testimony of Lester M. Edge.)

Q. They will invite fishermen and hunters and campers in this area?

A. Yes, sir, that is definitely in mind.

Q. To the north of—as we go into the forest, what quantity of timber have you figured will come down over this road that is being taken here now?

A. Conservatively speaking, it would be around a billion feet.

Q. Around a billion, conservatively?

A. Conservatively speaking.

Q. What is the upper figure? A billion is your lower [53] figure. How high may the quantity go?

A. Well, that timber in there has not been cruised. I made the reconnaissance through there in December, 1943. I spent a month in there, all of December, and I was up and down the full length of the boundary and I would say the volume of timber will range between a billion to a billion four hundred million.

Q. Are you familiar with what the Forest Service designates as the West Humptulips working circle?

A. Well, that lately has been changed. I haven't a very good idea of where it is.

Q. That generally is the body of timber that will be tapped by this road, isn't it?

A. Well, now, yes, very closely.

Q. Yes. Mr. Edge, what is the difference, generally, between what may be called a green road and what may be described as a seasoned road?

A. Well, a green road would be any road that

(Testimony of Lester M. Edge.)

probably had been built for less than a year. I think that after a year's time a grade is pretty well set. That is the way we figured on railroad construction. We used to let the grade set from eight to twelve months before we laid steel on it.

Q. As a matter of fact, that railroad grade improves with use and age for a number of years, doesn't it? [54]

A. That depends on how the maintenance has been kept up. If the road has been maintained, drainage kept open, and—well, the drainage kept open, yes, it will improve to a certain extent, yes.

Q. And it becomes what is known as a seasoned road bed? A. That is right.

Q. The railroad road bed is when the ties and rails are removed, is generally speaking a very desirable bed for a truck logging road, isn't it?

A. Well, I don't know. I have had this experience with old logging grades and old railroad grades, that where those ties have been tamped, the ground or the material ballast beneath those ties have been tamped in there, and that material below the ties is very much more compact than the material between the ties, and unless you do considerable ripping there, sometimes you have even got to go down as far as two feet. If you don't do that, your road bed will develop a sort of a washpan effect on top—washboard effect on top. It really takes more maintenance, and for a few years after a railroad grade has been converted, than an ordinary grade. Now, that has been my experience.

(Testimony of Lester M. Edge.)

Q. It might take more dragging of the surface?

A. That is right.

Q. Just dragging of the surface? [55]

A. That is right.

Q. And the problem is overcome entirely if you drag the surface until those pockets fill?

A. Sometimes you put in a ripper. That is a machine with big teeth on it that you drive into there and tear it up and then you regrade it, and sometimes your ripper does not take out that wash-board effect.

Q. But generally speaking, an abandoned railroad grade—that is a railroad grade where the ties and rails have been removed, is a desirable grade to use for a logging truck road, isn't it?

A. Yes. I wouldn't say from the road bed standpoint. I would say from a standpoint of grade and alignment.

Q. Now, on this particular road, because it was built for railroad logging, it has a fixed maximum grade in throughout the whole of the road, hasn't it? A. Yes, sir.

Q. Do you know what that maximum is?

A. No, it is very low, around two or three per cent.

Q. And from place to place throughout that road, there are places where the side tracks were on the railroad? A. Yes.

Q. And those places, the road is substantially wider than your sixteen foot crown?

A. That is right. [56]



(Testimony of Lester M. Edge.)

Q. Ordinarily, the matter of brushing out the right of way and keeping up the ditches on the road is a matter of maintenance, isn't it?

A. That is right.

Q. Something you have to do annually, no matter what type of road, in order to keep it up?

A. Yes, sir.

Q. And there is also a certain amount of maintenance work to be done on wooden bridge structures after three or four years old?

A. Yes, sir.

Q. And such a matter as that slide on the O'Brien Creek Bridge is a matter that has commonly to be taken care of by maintenance?

A. That one on the O'Brien Creek Bridge, that would be more than maintenance.

Q. You would have considered it more than maintenance?

A. Yes, sir, because that was a major job.

Q. What would that major job have cost?

A. Well, that would be rather hard to estimate, because I was not familiar with the formation underneath. I think there was some reason for setting that crib there on top of the ground. The way it was put in there, it was not a very good job. Now, maybe there was bed rock or something in there that I don't know anything about. [57]

Q. You don't know anything about it?

A. I wouldn't say what the cost of that piece of reconstruction would have been, because I did not look at it from that angle.

(Testimony of Lester M. Edge.)

Q. You couldn't make any estimate of that?

A. I wouldn't attempt to make an estimate on that.

Q. What, generally, is the nature of the country south of the forest where these roads are situated, what type of forest road is on that country?

A. Well, it is cut over land, part of it has been artificially re-seeded. The reproduction or the small trees along the railroad grade are fairly dense, but as you get out in the area, why that growth rather thins out. Now, this is just my opinion on that. I haven't looked at it really from the standpoint of the Forest Service. I just looked at it from the standpoint of the road.

Q. You have not examined that from the standpoint of a forester?

A. No, that did not become part of my job. I have just been interested.

Q. You don't know what class of reforestation along that is?

A. No, I don't.

Q. Do you know how they classify lands for reforestation purposes?

A. That has been a rather long time. I had a little bit of [58] that in school. That is all I know about it. Ever since I left school I have been hooked up with roads, and I would rather not attempt to describe it to you. I know there is such a classification, but I couldn't tell you to be accurate about it.

Mr. Blair: That is all.

(Testimony of Lester M. Edge.)

The Court: Anything further of this witness, Mr. Keenan?

Redirect Examination

By Mr. Keenan:

Q. How much have you figured it would cost to maintain this road for a year, just ordinary maintenance?

Mr. Blair: We object as immaterial, Your Honor.

The Court: I think I will sustain the objection to that question. It involves so many other factors.

Mr. Keenan: That is all, then.

(Witness excused.) [59]

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WARD W. GANO,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Gano?

A. Ward W. Gano.

Q. And how old are you?

A. Thirty-two years.

Q. And are you employed by the United States Forest Service?      A. Yes.

Q. And in what capacity?

A. As structural engineer.

(Testimony of Ward W. Gano.)

Q. And have you had college training in engineering?

A. Yes, I have a Bachelor of Science degree in civil engineering.

Q. From what school?

A. University of Washington.

Q. And when did you finish the University of Washington?      A. In 1934.

Q. What did you do upon finishing?

A. I went to work for the United States Forest Service in Portland, first, as an engineering draftsman up until [60] 1936, when I was raised to a junior engineer, for two years, to 1938, and from 1938 to '39 I was an assistant engineer, and from 1939 till '42 as assistant engineer, and then to associate engineer. Since 1942 to date.

Q. And have you any work to do in connection with bridges?

A. Yes, that is my job, is the design and the general supervision of the construction and maintenance of bridges, lookout towers, and other structures.

Q. For the Forest Service?

A. For the Forest Service, yes, sir.

Q. And you are attached to the Regional Forest Service—Regional Office, are you not?

A. Yes, sir, Region 6.

Q. What territory is included in Region 6?

A. The States of Oregon and Washington, with the exception of two counties, Stevens and Pend Oreille, and the northeast corner of Washington,

(Testimony of Ward W. Gano.)

and also including the Del Norte County in Northern California.

Q. Have you designed any bridges for any one outside of the Forest Service? A. Some, yes.

Q. Who have you designed bridges for?

A. The Weyerhaeuser Timber Company, Ostrander Railroad & Timber Company, Pope & Talbott, Forest Products Treating Company, and Thomas & Jackson, and Seldon Logging [61] Engineers. That is all that I recall at the present time.

Q. Have you examined the property that was condemned in this case? A. I have.

Q. When did you make your examination?

A. In February, 1942.

Q. Made any examination since?

A. Yes, I examined it again in September of 1945.

Q. Well, what was your purpose in examining the property the first time?

A. The first examination, the purpose was to inspect the condition of the bridges and determine their safety for log traffic.

Q. For what purpose were these bridges originally built?

A. They were originally built for a logging railroad grade, and have been subsequently converted into a truck road.

Q. Now, what condition did you find the Stevens Creek Bridge at the time you first examined it?

A. In a dangerous condition to any logging truck traffic, at a very advanced stage of decay. The log

(Testimony of Ward W. Gano.)

crib piers were—had decayed to the point where there was local failure crushing at the bearing points. The stringers had an average of six-inch decay on the outside surfaces, which did not leave very much sound wood for load [62] capacity.

Q. Speaking as of October 22nd, 1943, assuming that Stevens Creek Bridge was in place then, what would you say its normal life would be from that date, October 22nd, 1943?

A. I would say it had no life as a log truck bridge.

Q. Well, assuming that a logger was going to use that bridge and it had to be replaced, did you form any opinion or make any estimate as to the cost of replacing it with a suitable structure for just strictly logging purposes?

A. Yes, sir, I did.

Q. What in your opinion would it have cost to have reconstructed that bridge with a suitable bridge, which would do the work for a logger?

Mr. Metzger: Object, if Your Honor please. His opinion is immaterial. We have testimony as to what it did cost.

The Court: Objection will be overruled, exception allowed.

A. I had made an estimate on the replacement of the bridge, considering the long term economy—that is, using creosoted material where desirable. The total estimate for it was \$6,000.00.

Q. How much would that be cut down if you eliminated [63] creosoted material?



(Testimony of Ward W. Gano.)

A. I would roughly estimate \$1500.00.

Q. Did you at any time make an estimate as to the cost of replacing—strike that question, please.

Again speaking as of October 22nd, 1943, what would you have assumed the remaining life of the O'Brien Creek Bridge or trestle to be?

A. I would have given it no remaining life.

Q. Did you ever estimate the cost of replacing the O'Brien Creek Bridge, or trestle, with another bridge or trestle?

A. Not with a bridge or trestle, with culvert construction.

Q. Why was a culvert construction used by the Forest Service rather than replacing the bridge?

A. In order to get the cheapest structure from a long-term standpoint. We could have replaced it with timber construction—that is, to the same standard as the original trestle, but it was not considered on an analyses of cost, that was the cheapest thing to do.

Q. What would be the normal life of one of these bridges, or trestles, if untreated material was used? I mean, normal life—entire life span of a new bridge of the same construction?

A. Roughly, fifteen to twenty years.

Q. Will you give us the remaining life of those other [64] bridges from the Dry Ravine Bridge and the three Donkey Creek Bridges, speaking as of October 22nd, 1943?

A. Of course, that is a matter of opinion on those things. It is difficult to tie every remaining life—

(Testimony of Ward W. Gano.)

to tie it down positively, but I would estimate six years or seven years.

Q. In that six or seven-year figure, does that apply generally to those five figures?

A. To the five figures, yes, sir.

Q. How much would it cost to maintain these bridges per annum?

Mr. Blair: We object as being wholly immaterial, Your Honor.

The Court: Of course, I assume that the question implies the use to which they were being put in 1943, or the use to which the Forest Service intended to put them.

Mr. Keenan: I was asking the question, Your Honor, as it has a bearing on benefits. I think that I should distinguish between the two situations in question, and I will withdraw the question, if the Court please.

Q. Assuming that the cheapest type of construction—strike that.

What would you assume the cost of maintenance would [65] be on these bridges as they existed, when you first saw them and as of October 22nd, 1943?

Mr. Blair: We object to that, Your Honor, as being wholly immaterial. I don't know—

The Court: Objection will be overruled and exception allowed.

Q. All right, to clarify the issue, Mr. Gano, I am not assuming any culvert at the O'Brien Creek Bridge.

A. The cost of maintaining them alone, to keep

(Testimony of Ward W. Gano.)

them in the same condition suitable for log traffic—

Q. That is what I mean, and assuming, of course, the structure was in such sound condition that it was worth while to put some maintenance on it.

Mr. Metzger: We object, Your Honor, please.

The Court: I think I will sustain the objection to the question. I think there is too much hypothesis in it.

Q. And assuming, Mr. Gano, that the Polson Logging Company kept this road, and had to maintain the bridges on that road, what would it cost per year, in your opinion, to maintain those bridges properly.

Mr. Blair: Same objection, Your Honor.

The Court: Oh, I think he may answer. The jury will understand, of course, this is merely an estimate and there may be many factors involved. I do not [66] know whether the question implies the hauling of it being done at the immediate time, or the hauling was contemplated to be done on it independent of any products coming out of the forest.

A. The best estimate—I have given some thought to what a reasonable, prudent operator might do towards the standard of replacement for the cheapest over-all construction—cheapest over-all cost, and for the seven bridges it is very probable that at least four of those could be eliminated by fill and culvert construction, in order to get the longest—the cheapest longest term cost, which would leave

(Testimony of Ward W. Gano.)

three bridges, which as of 1943 would be replaced within a short period, and roughly that estimate totaled \$67,000.00 for the elimination of four bridges and the replacement of three.

Mr. Metzger: If Your Honor please, I move to strike this answer as not responsive.

The Court: I do not think it is. I think I shall grant the motion. The jury are instructed to disregard it. I do not think the witness understood the question that was propounded.

Q. I am asking, Mr. Gano, if, assuming the bridges were left in place, can you—and assuming, too, that the traffic was fairly light.

A. Around \$350.00 to \$400.00. [67]

Q. Per annum?

A. Per annum, yes, sir.

Q. That three hundred and fifty to four hundred dollars, that is assuming logging over on the bridge?

A. Just light traffic conditions. In heavy logging conditions you would have to up that figure considerably.

Q. How much, can you tell us?

A. Rough estimate, double it.

Mr. Keenan: You may cross-examine.

### Cross-Examination

By Mr. Blair:

Q. Mr. Gano, at the time you first became acquainted with this highway that is under condemnation, it was then being used to truck logs?

A. That is right.

(Testimony of Ward W. Gano.)

Q. Although you felt at the time from your examination of two of the bridges, that it was probably not a very—not very good shape for operation?

A. It was not in safe shape for operation.

Q. But, they were trucking logs over them?

A. Yes, sir.

Q. And the people trucking logs over, were people other than Polson Logging Company?

A. Yes. [68]

Q. That is, there were other loggers who had made arrangements with Polson Logging Company to pay a fee for the use of this road?

A. I don't know about those arrangements. I am acquainted with the fact that it was not only Polson Logging Company that was hauling logs.

Q. And it is a common thing in the logging business for loggers to pay a fee for the use of a logging road, owned by another party?

A. That is not my business.

Q. You are not familiar——

A. I can't very well testify to that.

Q. Are you familiar with the body of timber that was expected to come out on this road to the north?

A. No, I am not.

Q. Assuming that there is a billion to a billion four hundred million feet of timber in there, and that timber could reasonably pay a dollar a thousand for coming out over that road, which would amount to a million to a million four hundred thousand dollars, do you think the maintenance fee of

(Testimony of Ward W. Gano.)

\$900.00 a year to maintain that road would be very serious in the eyes of the owner?

Mr. Keenan: The question is objected to on the ground it is not shown that the Polson Logging Company owned any such body of timber, or any timber that would [69] come out over this road, and what the maintenance fee would be, if the Forest Service timber comes out, is certainly not in issue.

Mr. Blair: The witness himself testified \$900.00 a year for heavy traffic. I don't care who owns the timber, it is a question of how much it is that the owner of the road might be expected to realize.

The Court: Well, I do not think, Mr. Blair, the question of the toll could be an item of measure of the value of this property.

Mr. Blair: It is a measure of its earning capacity, which is one of the factors to be taken into consideration.

The Court: I will take the position it is the objective to make an outlet for forest products, for use of the general public. I think I shall have to sustain the objection to the question, and if you want to make a record I will give you an opportunity to make an offer of proof.

Mr. Blair: Not with this witness, Your Honor. We merely take an exception to the ruling.

The Court: Yes.

Q. You say, Mr. Gano, with respect to that O'Brien Creek Bridge, you thought the culvert type of construction that was used, was over a period of time the most economical, [70] is that true?



(Testimony of Ward W. Gano.)

A. Yes, sir.

Q. And over what period of time did you expect there would be heavy log traffic, or light log traffic, or the hauling of logs over this road—over what period of time did you estimate that traffic would continue?

A. I made no estimate on that, sir. My estimate was based on the fact that the road would be acquired for—we will say a permanent period of time, in order to administrate the line.

Q. Without trying to fix any definite number of years at all?

A. That is right.

Mr. Blair: That is all.

Mr. Keenan: That is all, Mr. Gano.

(Witness excused.) [71]

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EARL PHILLIPS,

produced as a witness on behalf of the Petitioner, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Stella:

Q. State your name, please.

A. Earl Phillips.

Q. What is your business or occupation?

A. I am a safety engineer.

Q. Where are you employed?

A. Employed by the Army Service Forces in Seattle.

(Testimony of Earl Phillips.)

Q. How long have you been a safety engineer, Mr. Phillips?      A. About six years.

Q. What else have you done, Mr. Phillips?

A. 1924 to '25 I worked for the Grays Harbor County Assessor as field man, checking lines, appraising property for tax purposes.

1926 to '27—'26 and '27, I was with the Puget Sound Power & Light Company, and attended the University of Washington at the same time, and then until 1930 I worked—was working in Seattle at various occupations, and I returned to Grays Harbor in 1930.

From 1930 to 1937 I worked at various logging and lumber operations. I worked in sawmills and logging [72] camps, and also during that period of time, I did some independent photographic work, newspaper work, and commercial photography.

Q. How long have you been a commercial photographer, Mr. Phillips?

A. In and out of it ever since I finished school.

Q. You have been for the past five or six years or more, continuously employed as a commercial photographer, or had your own business?

A. No, I have not been in photography at all for the last four or five years. I have been working at safety engineering entirely.

Q. Mr. Phillips, are you familiar with the land in question here, the land that is being taken by the United States, represented by the green line?

A. Yes.

Q. Several green lines on this map?

(Testimony of Earl Phillips.)

A. Yes, sir, I am.

Pardon me, sir, I should—I think I should make a correction there in the answer, that I have not been in photography for the last few years. For the Weyerhaeuser Timber Company, I did considerable photography for them in 1937 and 1939. I did considerable photographic work for the State Department of Labor and Industries fairly recently.

Q. Did you have occasion to visit the lands being taken by the United States?

A. Yes, I have.

Q. When did you last inspect it?

A. 1942.

Q. Do you recall about when it was in 1942?

A. I was there on three different occasions, I believe. I think two of those occasions were in March, and the other one was approximately that time.

Q. Did you take any photographs of the road that was taken?      A. Yes, sir.

Q. I am handing you Exhibits 3 to 8, Mr. Phillips, and I will ask you what those are?

A. The first picture, Exhibit No. 3, is that?

Q. Yes.

A. That is in Section 11.

Q. I will ask you what it is, just tell——

A. This is a photograph.

Q. Photograph of what?

A. Photograph of logged off area in Section 11, in the area under discussion, showing the portion of the logging road that was in use by the M. & D.

(Testimony of Earl Phillips.)

Logging Company at that time. It shows the condition of the land generally at that point.

Q. Now, take the next one, Mr. Phillips. [74]

A. This is a portion of the road.

Q. What Exhibit is that, that you are referring to there? A. This is Exhibit 4.

Q. Petitioner's Exhibit 4?

A. Yes, sir, 4. That is a photograph showing a portion of the road under question in Section 9.

This picture shows a portion of the road and typical surrounding area.

The Court: And when were they taken?

A. These have my date stamp of March 14th, 1942.

The Court: I suggest that as fast as they are identified, when you complete your identification, pass them to counsel for the respondent so we will not have the necessity of handing them all to him at once, and having to wait for them. Let's proceed.

Have you finished with that third one for the record?

The Witness: Yes, sir.

Q. Petitioner's Exhibit 4.

The Court: All right, go right ahead.

A. This is Exhibit—Petitioner's Exhibit No. 5, and this is also in Section 9, the same as the last picture. This picture shows a portion of the road, and a portion of what previously was a railroad siding. The ties are [75] still in place, and shows the surrounding logged off area.

(Testimony of Earl Phillips.)

Q. When was that taken—were all these taken the same date?

A. That has the same date, I believe, March 14th, 1942.

This is Petitioner's Exhibit No. 6. This is a fairly close-up photograph of the hillside to the east, looking eastward from an area—or from a position at the foot of the hill, roughly at the point where the road of the M. & D. Timber Company shown in the previous exhibit comes down off of the hill. This is a close-up picture showing the logged over land—stump land.

This is Petitioner's Exhibit No. 7. This picture was taken in September of '41. That was the first trip that I made to this country. This picture shows the culvert, and a portion of the road at the foot of the hill at Newberry Creek, which is located I believe in Section——

The Court: You may step down.

Mr. Stella: You may step down and look at the map, Mr. Phillips, if that will help you.

A. I believe that is Section 6. I am not positive of that answer, of that location. However, it is the culvert at the foot of the hill at Newberry Creek on [76] the road across from Brook Hill over to the logging operation.

This is Petitioner's Exhibit 8, also in Section 11, showing a very small portion of the road and a considerable area of logged off land in burned slash.

Mr. Stella: I offer these in evidence.

The Court: Any objections?

(Testimony of Earl Phillips.)

Mr. Metzger: Yes, Your Honor. I have to interrogate the witness, I think, a little bit more to make the force of my objection, but I object generally to Identifications 3, 4, 5, 6, and 8, particularly, in that they do not show any property involved in this suit, sought to be acquired in this suit, and from the——

The Court: They say generally. Isn't Section 11 in this suit?

Mr. Metzger: There is a road goes through Section 11, but the pictures I believe do not show any part of any road that is sought to be acquired in this action.

The Court: Well, if that be conceded by the petitioner, then of course they wouldn't be competent. Do you agree that these are other roads in that area?

Mr. Stella: That there are other roads?

The Court: No, the pictures. [77]

Mr. Stella: No, he testified that these pictures are particular pictures taken on this road.

The Court: No, he testified they were in Section 11 and Section 6, but he did not identify them on this map, as I recall his testimony.

Mr. Keenan: Those Sections are owned by Polson, Your Honor. The road runs through the Section, and it is typical——

The Court: The objection being made is that it is not this road at all the pictures were taken of. They are making other roads in Section 11 or logging roads or railroads?



(Testimony of Earl Phillips.)

Mr. Stella: He testified the pictures were taken of the road.

The Court: Well, why not ask him the direct question.

Q. Mr. Phillips, I will ask you if the pictures show the road here of Petitioner's Exhibits 3, 4, 5, 6, and 8, 3 to 8 inclusive, are pictures showing the road taken by the United States?

A. They are.

Mr. Metzger: Well, if Your Honor please, in view of that evidence, I ask leave to examine the witness to test the correctness of his answer.

The Court: Very well, you may ask him on [78] voir dire. You may do so.

Pass the pictures to the bailiff. The bailiff will make himself available, and you can keep all of them except the one you are examining on.

Mr. Metzger: Well, Mr. Phillips, can you tell me in what part of Section 11 that picture was taken?

The Witness: That would be in the northeast quarter.

Mr. Metzger: In the northeast quarter, and which direction are you looking?

The Witness: You are looking east, and a little bit north.

Mr. Metzger: East and a little bit north. All right, now, will you come to Exhibit 2, and indicate as near as you can the spot where you think that picture was taken? Step down here and indicate with a pencil.

The Court: Use the colored pencil, a red pencil

(Testimony of Earl Phillips.)

will probably show up better.

Mr. Metzger: A very small mark, where you think that picture was taken.

The Witness: This one?

Mr. Metzger: Yes.

The Witness: You want the camera location?

Mr. Metzger: Yes, the camera location, and then put a little arrow showing the direction it was taken.

(Witness does as directed.)

The Court: Now, you say you want him to place an arrow there?

Mr. Metzger: He has done so.

The Court: Then, he better identify it further.

Mr. Metzger: By a little "3" under that. All right. Which of these roads indicated on Exhibit 2, if any, is shown in that Exhibit 3? Well, you can just answer the question, tell me which one, mark it here.

This is for the benefit of the jury, there is line "H", going up, and line "G", is the second, and the lower one is line "P".

The Witness: I believe it to be line "G". I can't be positive of that, looking at the map I can locate it in that country. I can show you the road on that map. I can't be positive of which of those two it is.

Mr. Metzger: You can't be positive which it is?

The Witness: No, sir. [80]

Mr. Metzger: And as a matter of fact, you don't even know whether it isn't another road there that is not shown on this map, do you?

(Testimony of Earl Phillips.)

The Witness: No, sir, but I could take you to the road and show you the road that is shown in this picture.

Mr. Metzger: Then, I object to this identification because the witness is unable to identify to what it relates.

The Court: I understand your objection is that he is unable to identify it.

He asked you whether this related to some other road than those indicated on the map.

The Witness: Some other than those indicated on the map?

The Court: Yes.

The Witness: I don't believe it possibly could be but one of the roads shown there because the location in—now, you've got me there. I believe that it is one of those roads shown on the map. I can't go any further than that.

The Court: Well, that identification is not very satisfactory. It is a question of what weight should be given to it. Do you think if you had time to examine further maps you could further identify the place [81] you were on, and the picture was taken on?

The Witness: Possibly. I know this road was the road that the M. D. Logging Company was logging on at the time I took the picture.

The Court: I think I shall sustain the objection to the offer of proof on the statement of this witness, but I would not foreclose you from fully identifying it.

(Testimony of Earl Phillips.)

Mr. Stella: As far as that one exhibit is concerned, Your Honor?

The Court: Yes.

Mr. Metzger: Mr. Phillips, please take your Identification No. 4 and indicate on Exhibit 2 where that picture was taken, and the direction in which it was taken.

(Whereupon, witness did as directed.)

Mr. Metzger: You have——

The Witness: Wait a minute, I should have—roughly, at this location (indicating).

Mr. Metzger: You have made a mark in the southeast corner of Section 4, near line “B”, looking northerly, is that right?

The Witness: Yes, sir.

Mr. Metzger: Now, at whose request did you [82] take those pictures?

The Witness: Mr. Abel.

Mr. Metzger: Mr. Abel, and you were taking pictures of some roads over which the M. & D. Timber Company was seeking to acquire an easement?

Mr. Keenan: If the Court please, this is not cross-examination. He is trying to show the authenticity of the photograph. I don't think this has any bearing on that picture.

The Court: I don't think so.

Mr. Metzger: I am trying to show he was taking a picture of a road at an entirely different location.

The Court: You may do that, but now you are going into some entirely different matter.

(Testimony of Earl Phillips.)

Mr. Metzger: Mr. Phillips, you say you took the picture as you marked it here, in the southeast corner of Section 11, looking more or less north?

The Witness: Just a minute.

Mr. Metzger: Section 9,—I said Section 9. I meant Section 11. As a matter of fact, that picture is taken of a road and flat on Section 11, not far from where your first picture, Exhibit 4, was taken, of a road that ran down around over to the east line of Section 11, isn't that correct? [83]

The Witness: No, sir.

Mr. Metzger: It is not?

The Witness: No, sir.

The Court: Let's make a disposition of this Exhibit now.

Mr. Metzger: I still think the witness is wrong, Your Honor.

The Court: Well, I assume the Government is still offering the Exhibit?

Mr. Stella: Yes.

Mr. Metzger: I haven't finished on this particular Exhibit.

The Court: I thought you were passing him another. I want to expedite this.

Mr. Metzger: But I don't think it is a proper thing to let this jury have pictures——

The Court: Unless they are identified as of some section of the road involved.

Mr. Metzger: I am satisfied they are not.

The Court: Let's proceed, if you want to identify or examine——

(Testimony of Earl Phillips.)

Mr. Metzger: Will you tell me where you took Exhibit 5, now?

The Witness: This is a close-up of some of the same area that is shown in the previous picture. [84]

Mr. Metzger: Taken about the same place?

The Witness: No, sir, taken at a different camera location.

Mr. Metzger: Would you say it is very close to the same place, a matter of fifty feet or so?

The Witness: A matter of—I would judge not over two hundred and fifty feet.

Mr. Metzger: Not over two hundred and fifty feet, so you would say both 4 and 5 were taken in Section 9?

The Witness: That is right.

Mr. Metzger: Would you say they show this line "B", that road?

The Witness: Yes, sir.

Mr. Metzger: Now, I renew my question, who did you take them for?

The Witness: Mr. Abel.

Mr. Metzger: And you were taking them of a picture——

Mr. Keenan: I object to that.

The Court: Objection overruled.

Mr. Metzger: And you were taking them of pictures of a road that the M. & D. Timber Company was seeking to condemn, were you not?

The Witness: That is right. [85]

Mr. Metzger: That is right.

The Witness: That was my understanding.



(Testimony of Earl Phillips.)

Mr. Metzger: That was your understanding, yes.

Now, I renew my objections, Your Honor please, because it is a matter of record in the Supreme Court of this State, that Mr. Abel in his proceeding, abandoned the taking of anything covered by the Government's taking in this proceeding.

The Court: The sole question is whether these photographs were taken at a time near enough to be material here, and the witness says they were taken in Section 9, but he said he was taking them in connection with another lawsuit, and they were brought here. That does not destroy the effect of his testimony. They can be repudiated if he is in error. Objection overruled as to the exhibits he has identified.

Mr. Metzger: 4 and 5?

The Court: Yes.

(Whereupon, pictures referred to were then received in evidence and marked Petitioner's Exhibits Nos. 4 and 5.)

The Court: 4 and 5 are admitted.

Mr. Metzger: What road or property that is sought to be taken in this suit, is shown by that picture? [86]

The Witness: There is no road shown in this picture.

Mr. Metzger: What property that is sought to be taken is shown?

The Witness: There is no portion of a right-of-way shown in the picture, a road.

(Testimony of Earl Phillips.)

Mr. Metzger: What property—what property is shown in that picture?

The Court: You may step down to the map and indicate where you took the picture.

The Witness: This is a picture—close-up picture of the ridge, Section 11, that the M. & D. Logging Company's road was still on. This was taken just about at the base of that road.

Mr. Metzger: And just shows a hillside?

The Witness: That is right.

Mr. Metzger: We will object as immaterial and irrelevant.

The Court: Will you let me see it?

I am rather inclined to agree with you, if it is.

I am inclined to sustain the objection to this. I do not see that it can add very much.

Mr. Keenan: If the Court please, I fail to see how the jury can intelligently consider this case [87] without some information as to the surrounding cover and the character of the land through which this road runs.

The Court: Well, this road it is testified, runs a distance of ten or fifteen miles, and the picture evidently indicates a region of—very small fraction of an acre.

Mr. Keenan: That, Your Honor, is probably true. Nevertheless I think it is typical cover and I think it can be shown so to be.

The Court: He has not identified it as typical of the entire region, or any particular part of the region, on the identification made, both directly and

(Testimony of Earl Phillips.)

on voir dire. I do not think this is a competent exhibit, and shall reject the offer.

Mr. Metzger: Now, Exhibit 7, Mr. Phillips, will you please indicate on Exhibit 2 where that picture was taken, and the direction in which the camera was pointed?

The Witness: I remember this picture as being taken facing—as I remember, facing north at the culvert and Newberry Creek. Now, on this exhibit I do not see Newberry Creek.

The Court: If you have some engineers that drew this, that such a creek is there, and can identify [88] it, I am going to let you permit him to orient himself.

Mr. Rands: Newberry Creek is right up through here, like this.

Mr. Metzger: Just put a "7" there. Have you marked a "7", so as to indicate which one that is?

And the last exhibit—I beg your pardon, before looking at that, which road does this picture—which road on Exhibit 2 does this picture—excuse me, Your Honor, I beg your pardon,—Exhibit 7 show?

The Witness: This road that comes through this way (indicating).

Mr. Metzger: Line "K", the line—indicate line "K".

All right, I will withdraw any objection to exhibit 7.

The Court: That will be admitted.

(Whereupon, photograph referred to was re-

(Testimony of Earl Phillips.)

ceived in evidence and marked Petitioner's Exhibit No. 7.)

Mr. Metzger: Exhibit 8, where do you say that was taken? Will you please mark it?

The Witness: That would be roughly in this area.

The Court: Speak a little louder.

Mr. Metzger: In which direction was it looking?

The Witness: Looking in this direction (indicating).

The Court: Looking which direction

The Witness: Eastward, I believe, sir.

Mr. Metzger: Make an "8" there, please, Mr. Phillips.

The Court: Is that part of the identification?

Mr. Metzger: Which road does it show, in your opinion?

The Witness: That shows a portion of this road.

Mr. Metzger: Which would be line "B", then?

The Witness: Yes, sir.

The Court: Any objection?

Mr. Metzger: Well, if Your Honor please, on that identification I object as the picture is immaterial and irrelevant and improper. It does not show any depth. It has no competency, or value to the jury. It shows about three inches on the curve of the road, nothing else.

The Court: Objection overruled, and exception allowed, and it will be admitted in evidence.

(Whereupon, photograph referred to was

(Testimony of Earl Phillips.)

then received in evidence and marked Petitioner's [90] Exhibit No. 8.)

Mr. Stella: That is all.

The Court: Those that have been admitted, you better pass them to the jury now, and let them examine. Mr. Bailiff, take these pictures that have been admitted and hand them to Juror No. 1, and he can examine them and pass them on, and bring them back on around. There were four of them, and two were rejected; and Mr. Stella, do you have anything further on direct?

Mr. Stella: Nothing further.

The Court: Do you have any cross-examination?

Mr. Metzger: No, Your Honor.

The Court: You may step down, Mr. Phillips.

(Witness excused.)

The Court: You have no real short witness now, Mr. Stella?

Mr. Keenan: No, I do not.

The Court: I expect to adjourn very quickly now.

Mr. Kennan: We haven't any short witness.

The Court: I thought you might have some witness, just on some formal matter that wanted to get away.

Mr. Keenan: I think we have only one short [91] witness left, and we will have him here the first thing in the morning.

The Court: Now, ladies and gentlemen of the jury, we have worked right through since 1:30, because—and I told you that we would adjourn a little

(Testimony of Earl Phillips.)

bit early, and I am going to keep my word in that respect and you will be excused now to report back at 10:00 o'clock tomorrow morning,—and I said ladies and gentlemen of the jury—I did not mean that; we have an all-man jury, which has been rather unusual and you will remember the admonition I gave you. If any one asks you what you are doing, you are sitting as a juror in Federal Court trying a condemnation case and beyond that you better not go, so you get into the realm of what people tell you, what they think about it.

You are now excused.

(Whereupon, the jurors retired from the court room.)

The Court: Now, there are apparently at least two legal matters that should be disposed of. I think before we go much farther in this case, and we can expedite it by making a disposition of it, and one is as to whether this is a public road, so that the owners of contiguous lands and everybody else, [92] except under such restrictions as the Forestry Service inaugurates on their highway, might make use of it, and it is the contention of the respondent that it is not such a road, and I understand it is the contention of the petitioner that it is. Is that correct, Mr. Keenan and Mr. Metzger?

Mr. Metzger: We think it is a private road exclusively, like the road in Mt. Rainier National Park where the Government controls it, and admits people as they see fit, and they have so exercised that right



by putting up gates and keeping them locked on this road since the taking.

The Court: Well, of course, I am not here to determine whether they have a right to put up gates, or did not put up gates.

Mr. Metzger: That shows their interpretation of their right.

Mr. Keenan: As long as you are talking, Polson Logging Company tried to kick me off the road with their watchman.

The Court: It is not a question for this Court to determine whose rights there are there as claimed now, but from these pleadings and from this declaration of taking, whether or not it is broad enough to cover this generally—and I don't know whether I have [93] the last declaration of taking, the one filed on October 22, 1943—

Mr. Keenan: November 12th, mine is marked, 1943.

Mr. Metzger: November 12th is the last one.

The Court: Yes, I have it now.

Mr. Keenan: In the paragraph which I have before me, Your Honor, is labeled "B", a small "B".

The Court: Yes.

Mr. Keenan: Might I call this Court's attention to some of the language there, about half way down in the paragraph, "And prevention and extinguishment of fires therein, or adjacent thereto, and for use as a permanent highway for all said purposes, and for the use of the people of the United States generally for all lawful and proper purposes".

The Court: Yes, that is the language that I have.

Mr. Keenan: Then, it goes on:

“Having regard to the geographical, topographical and other conditions of said forest, and lands in the vicinity thereof, which affect the welfare and safety and preservation of the forest”.

Now, obviously, that road, and I think almost any other road can be closed to prevent a fire hazard, [94] and reasonable precautions can be taken to close any road in the public interest, temporarily, and if it were otherwise, the Polson Logging Company would be in court protesting greatly. They have land in there—cut over land which I assume they do not wish to have a fire in, and it might be necessary to close this road to keep people out of the woods within this township and adjacent to that road.

The Court: I do not think I have any difficulty in holding that this is a public highway with a certain limitation—that is, the limitation that the Forest Service will exercise jurisdiction of it in the matter of what they consider the public welfare of closing it against hazards, but the general public are entitled to make use of it except when they determine such a hazard exists, so they handle it the same as any other forest road that is open to the public, and of course the Court takes judicial notice of the fact that they are not only forest roads within the forest that are under their control. There are likewise public highways in the various states in which the forests are located, maintained by the states that go through the forest in many instances,

that the forest people maintain. In some instances, the state maintains them, so the question that might be of some high concern here is, "Could [95] the respondent say that he was going to have no benefit by reason of the well known restrictions that the Forest Service sometimes place upon their highways?"

Mr. Keenan: Isn't that a question of fact, Your Honor?

The Court: Well, that is what I was just wondering, and if it would not take some proof on what restrictions—I will hear from you, Mr. Blair and Mr. Metzger, if you differ with the Court. This is material only, of course, in reference to whether this would be any benefit offset as against any damages that are sustained.

Mr. Blair: Here is our position on that matter, Your Honor: If the State or the United States were condemning this property for use as a public highway, then concededly that benefit rule would be applicable. It is our contention that this condemnation is made for a special purpose, and it is made under statutes that give them the power to condemn for special purposes, not to open a public highway at all, but to open a road into this national forest. That is where they get their power to condemn the property, if they have any, and to compel us to submit to the reduction of our just compensation, and to have supposed benefits offset against us, it must be clear, not that we may [96] probably have the right to use this road some time, or we may through some-

body's concession be permitted to use it, we have got to have the legal right, the same as any member of the public, to the use of that highway, as a public highway.

The Court: Of course, you would have the same right as any other member, there is no question about that, but the general public might have a restricted use. You have the same right as any one else would have.

Mr. Blair: We would have the right to have the logs hauled out over that road, because the evidence would be this land has no value at all except for growing a new forest. We couldn't possibly have any benefit, unless we are permitted to use this road as a fire patrol and logging road, and certainly there is nothing in this condemnation and under this taking that is going to assure us of any right to use that as a logging road, as from time to time our forest, or any part of it, should be harvested, and certainly unless that is shown, there is no benefit involved here.

The Court: Well, I admit that it presents to me rather a close question as to whether we can have offsets—supposed benefits—that does not however follow if you cannot offset benefits that there still [97] would be nothing left to estimate in the way of damages, because you have here a constructed railroad grade in some degree of development, and you had some bridges that had some value, and you have your—I am not suggesting because I do not know what turn the evidence will take—some dam-

age that might be asserted because a certain piece of land was cut in two, or something of that kind. Anyway, those are all questions that come into the case that I would like to settle outside of the hearing of the jury, and without the necessity of taking time for extended argument. The issue as to whether or not this is a road under construction and condemned, or taken, under such circumstances that would fall within the provisions of both statutory and common law of the State of Washington, wherein benefits may be offset against losses sustained, that is the one thing. The other that I would like to settle is this issue that has just been suggested slightly here in the course of the afternoon, that you were going to claim compensation based upon toll values of the hauling over the road from the National Forest to the public highway, and if you have some authority you want to cite to me on that, if there is any——

Mr. Metzger: There is on this first question, if Your Honor please, before we pass that. Let me say [98] here as I said there in the argument while the jury was present, there isn't any authority in the Secretary of Agriculture having acquired this road, to dedicate it to the public, and counsel for the Government hasn't come forward to dispute that statement.

Now, I take—make the contrary—the converse statement, which Your Honor will recall has been made in this matter many times before, the statute



prohibits the enlargement of the National Forest, except by special act of Congress.

Now, if this acquisition is to be an acquisition as a—something for the public, outside the forest as a general acquisition for the public good—the public generally, then it runs in my opinion, right squarely counter to the proposition that the boundaries of the Olympic Forest cannot be enlarged without special act of Congress.

The Court: Of course, this Court passed upon that, whether rightly or wrongly.

Mr. Metzger: The point is here, if they take it as a means of access to the forest, and limit it that way, that would be good, but when they come along and now seek to contend that they are taking it as a general good for the public, generally, then they are adding to the public domain—adding for the benefit of the public, [99] and they are running counter—

The Court: Now, I cannot follow you in your reasoning there, Mr. Metzger. The forest itself was created for the benefit of the whole public, not for the benefit of the respondent in this case, or anybody else who happened to own land that lay contiguous to it. That is, they should not be permitted, and it was never contended and cannot be, to have an exclusive domain in the National Forest, that deprives others of an equal right to the use of it by reason of the fact their land joins it.

Mr. Metzger: That is true.

The Court: And the question that I have here now, is whether this road, primarily, for the pur-



poses set forth, and the Court has had to give a broad construction to the language of the basic act that created the National Forest, is for the purpose of giving the Government egress and ingress to a National Forest that was set up for certain definite purposes, the major perhaps among them, is to furnish a continuous supply of timber through the years and generations, others, recreation, and others are water control, and water shed protection, and a number of other things that I do not need to mention. The declaration of taking here follows in a general way the [100] language of the basic forest act, dating back to 1893 or '94, whenever it was—I can't give the date, but it includes all of these objectives and purposes.

Now, does that constitute a public highway so that not only people who buy timber in there, but everybody who may come that way, has a right to go in and come out, when they were under such conditions as they desire, excepting in such protective provisions as the act provides for all forest roads and forests—that is the question here, and if it does, of course the Polson Logging Company, with lands contiguous for ten or fifteen miles on either side of this road, can drive onto it whenever they want to, or off of it, and if they can, then they would be under it, giving application to the State law, they would be entitled to—chargeable with benefits that they may derive if any, as against damages they may sustain.

Now, that is the problem.

Mr. Metzger: That is the problem, but on the

other hand, as I tried to say and I hope I make myself clear, that if the taking is that broad—if the taking is of a highway to be maintained outside the National Forest for the benefit of the land owner through whom that land runs, with respect to his lands——

The Court: Well, for his benefit and everybody [101] else's benefit.

Mr. Metzger: Well, if it is to be maintained, then the only thing that can be is an addition to the area of the National Forest. If the power exists, which we disagree on, as a matter of fact——

The Court: I appreciate that.

Mr. Metzger (Continuing): If the power exists, it is a power limited to providing ingress and egress, and purposes connected with the forest. If that is the extent of the power, then this declaration cannot be construed to go beyond the extent of the power.

The Court: In establishing a public highway.

Mr. Metzger: In establishing a public highway, and if the power is limited to the private use, that is, for the benefit of ingress and egress to the forest, then there is no question of a public highway for Polson to be able to use and enjoy for his own land, outside.

Mr. Blair: It seems to me, Your Honor, there may be this practical answer to the problem we are confronted with here. We all recognize that the respondent land owner is entitled to just compensation and full compensation, and that it should not be whittled down by benefits, unless, certainly, he

just have those benefits. I think this road, so far as it being a public road, is no different than any other forest road. It is, or it is [102] not in the same category as other forest roads.

Now we know, and I think counsel will concede, that as a matter of ordinary practice, the Forest Service does impose charges for use of their roads by private logging operators, just as a matter of practice. If that is true, if Polson is going to have to pay a toll—whether they do or not, if he can be either excluded or made to pay a toll, then there is certainly nothing of the character of benefits. He is entitled to the compensation that he would receive if somebody took the road and closed it and never permitted another vehicle to travel over it. That is the compensation he is entitled to if the United States, after this taking, has the power to produce that result.

If, as a matter of ordinary practice, they do impose charges for use of their Forest Service roads, as they do, I believe then that ought to be the answer to the question now before the Court.

The Court: I do not know if they do. If they do—if either—

Mr. Keenan: I don't understand the Forest Service imposes charges. In any event, they do sometimes where private operators—have the operator, where he is using the road exclusively, do the ordinary maintenance. In other words, he does the maintenance on [103] the road and fixes up the damage he does by his logging trucks. Where several operators use the road, they usually share the

expense of maintenance, and that expense of maintenance is that extra maintenance which results whenever a road is used for heavy logging traffic. There is no charge as such. There is no profit to the United States. It is simply a question of where the operator of these logging trucks takes care of the maintenance—the extra maintenance that his trucks have caused, but he is still freed from any outlay in the way of capital expenditure on road improvements and such, over a period of time. It is just the slight amount of damage that he does over the interim. That is my understanding.

One other question was raised by Your Honor.

The Court: Well, this question of whether damages or benefits can be offset, I am rather inclined to doubt whether they can.

Mr. Keenan: I don't think there is any question but what——

The Court: If this is a public highway, but this is not in the full sense a public highway. This is a highway for the benefit of the public in the uses of the National Forest.

Mr. Keenan: Quite true, Your Honor, but it [104] is also a highway to prevent fire, and we know one thing in spite of all the logistics——

The Court: I can see the difficulty in the interpretation of this question. That is why I want to take this time of the jury. If the argument is made by the respondent, his place is cut in two, and he will never be allowed to go upon this highway, and be excluded from it, and of course then the

measure of damages would be far more substantial. On the other hand, if the Government takes the position that this highway is open to him to haul ten, twelve or fifteen or twenty-ton truck loads across it without hindrance, then he certainly should be charged for the benefit that comes from such use. Neither of those situations can logically be contended for. I think the Court is warranted in taking judicial notice of that. In the first place, the owner of contiguous lands has exactly the same right as everybody else does. If he lives a mile from where the road ends, he can drive on to it there, or if he lives ten miles he can drive on to it. He can't use it in such a manner as to destroy it. He couldn't do that with a state highway, because that can be limited and is limited, put caterpillars on there and tear the road up—do those things, but the question that is more serious, is whether I shall attempt to, or [105] shall determine that this is a valuable improvement to the Polsons, themselves. That is what the effect of the benefit would be here, of this respondent, by reason of the Government's expenditure of \$298,000.00, or \$100,000.00 that has been testified that they are going to spend, and they have already spent a substantial portion of it, and the jury must weigh and consider what added value has come to the respondent and his contiguous lands by reason of this expenditure, and I am inclined to believe then, I run into the question that perhaps goes beyond the power that the Department of Agriculture have under the act. I have held, and it is by what I consider logical inference, and it is



not from the express language that the Government has a right to have a road out and in from its forest for the benefit of the general public, and for the use and purposes for which it was built, but when I go farther than that any say this becomes a public highway outside the National Forest, carrying with it all the elements of a federally owned or state owned or county owned public highway, that is what I must, if I permit the jury to offset benefits against damages. Then, I think I am enlarging the forest beyond its exterior boundary.

Mr. Keenan: I think not. We all know the [106] Polson Logging Company will use the road, no matter what it is called; that nobody living along the road, or having property along that road is going to be barred from going to and from his property, in and out of the fire season. We all know that is going to happen, no matter what name you call it. Call it public, private, or what you will, there is no question—there can be no question as a practical matter, but what land alongside a road, by whatever name you call that road, is benefited by the installation and maintenance of that road.

The Court: That isn't the question here, Mr. Keenan. The question is that you have here, did the Congress ever confer upon the Secretary of Agriculture, either by the original act setting up National Forests, or any or all of the subsequent acts, the power to come outside a forest and build a highway, independent of the identification of that highway, may have to a full and complete use of the forest.



Mr. Keenan: I assumed, Your Honor, that question has been determined before, at least for the purposes of this trial, before we started.

The Court: It was not determined on the issue of offsetting benefits against damages.

Mr. Keenan: I think that if it is determined [107] for one purpose, that the taking is proper, and we know as a practical matter that they will be used, and the declaration of taking says that it is for the public generally, for all lawful purposes, or some such language.

The Court: I think I shall decide here and now, so we won't wander too far afield, that there shall be no element of benefit to be offset against damages or compensation in this road, and I shall instruct the jury, of course, that no element of damages or loss, neither, shall be calculated upon any theory the respondents are going to be denied the same use that everybody else has to this highway—such uses as the Forest Service sees fit to make, and you may have an exception.

Mr. Keenan: It is my understanding of the Federal law on condemnation, quite apart from the State law, and I am speaking offhand, that wherever severance damage and benefit can be shown without exception don't depend on any statute. In the next question, is Polson Logging Company going to—

The Court: I think your law is correct, that is probably where I made the mistake in this case, by not requiring counsel on both sides to furnish points of authorities. I am rather inclined to be-

lieve [108] that your statement, Mr.—I am inclined—I feel certain on that, the ground in that, that if severance damages to the lands remaining are asserted, then you can offset benefits to the lands—that is, offer proof as to what benefits, to offset the damage, but whether they could ever reach the point where nominal damages are allowed, I don't think we will have so much trouble about that, but I am concerned about the other question, whether an item of damage would be the prospective tolls—whether it isn't so remote, and it gets into the field of speculation, but second and upon the more serious ground, whether any adjoining land owner to a National Forest can look forward to the day when the Government decides to put that product on the market and make a toll charge and add to his burden of the product to the extent of the toll, and use that as the basis for calculating compensation, for the Government seeks a way out and in, and if you intend to offer proof along that line as to what would be a fair reasonable toll, I want to hear from you and I am inclined to hold against you now, unless you convince me.

(Whereupon, argument by counsel.)

The Court: I shall hold now on the two issues passed upon, the one, that is benefits to the adjoining [109] land owner except as they involve asserted losses claimed by severance, cannot be shown; that the respondent on the other hand cannot show as an item of compensation any future potential or prospective tolls that he might have earned on this road by the haulage from the forest of growing

timber, or by any use that the general public might make to this way of ingress and egress to enter the forest, or go from the forest at any time.

Now, that should simplify your issue and bring you down to the issue of just what we will allow for compensation, and I in that respect, am not going to bind myself by this ruling now, but I am inclined to hold that a showing is competent on the part of the respondent that his damages go beyond the taking of the mere acreage involved in the land, and the damage to the remaining land, but they include therein likewise what the cash market value was to the improvements as taken on the day they were taken, and of course, that does not foreclose the Government from showing that they had no value.

Mr. Keenan: As I understand it, then, it is simply a question of fair cash market value of the road.

The Court: Well, that includes these [110] elements—I am mentioning the elements so you can direct your testimony along those lines.

Mr. Keenan: I think I should at this time advise the Court and counsel that the Government's testimony will be less than the amount of the amount of the deposit—substantially less, and if so I am now informed, at least, and if any attempt is made either by questioning of one of the Government's witnesses or through statement of counsel or answer of respondents of land owners, witnesses to bring out the amount of deposits, the Government will move for a mistrial.

The Court: Well, I am not going to assume that counsel for the respondent will attempt to do that, nor would I assume that the counsel for the Government would do that which is improper, but with the ruling that the Court has now made, we ought to be able to expedite it, and I am again going to ask if there is any serious demand there be a view of the premises? It is an expensive procedure. It would delay the trial, and under weather conditions now it might create a very trying trip for a jury.

Mr. Keenan: Could we consider that until tomorrow noon, and when I make that suggestion I realize it is a question of checking on—it is a [111] question of checking on the road and the safety of it, and there are other things the Judge is going to inquire into before he will rule, and I do not know the answers to those questions now.

The Court: Well, I will leave it open for you. I think the motion was originally made by the respondent, wasn't it?

Mr. Metzger: Yes, it was, Your Honor.

The Court: Now, you are not pressing your motion that you formerly made?

Mr. Metzger: We are not pressing it.

Mr. Blair: At this time, Your Honor, because this may be in the nature of a pre-trial or——

The Court: I want to see what I can eliminate from this case, and narrow the issues down.

Mr. Blair: In order to protect the record, we except to your Honor's ruling that we are not entitled to show prospective earnings; that an owner not compelled to sell and a buyer not compelled to

buy, would consider those respective earnings in arriving at the fair cash market value.

The Court: I think it is perfectly proper to except, and your exceptions are allowed, and I presume the Government excepts to the ruling against accepting benefits. [112]

Mr. Keenan: Yes.

The Court: Exception allowed. And now, if there is nothing further, the Court will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 o'clock A. M., November 13th, 1945.)

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November 13, 1945, 10:00 o'clock a.m.

The court met pursuant to adjournment; all parties present.

The Court: Now, you may proceed.

Mr. Stella: Mr. Phillips, will you come forward, please?

EARL PHILLIPS,

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Stella:

Q. Mr. Phillips, handing you Petitioner's Exhibits 4 and 5, which you testified to yesterday, will you tell the Court and the jury what they show or what they are?

A. Well, these pictures are——

(Testimony of Earl Phillips.)

Q. Are they pictures of the road?

A. Pardon?

Q. Are they pictures of the road?

A. These are not the pictures of the road in question as I testified yesterday. [114]

Q. You were mistaken yesterday?

A. That is right.

Q. As to whether they were pictures of the road or not?

A. That is right, I was confused in locating these pictures because they were made on another grade that comes down through here—another road that comes down through this area. Not having seen this map before, I placed them on this map.

Q. The first time you saw the map was yesterday morning?

A. That is right.

Q. The first time you have seen the pictures since you had them developed, till then?

A. Pardon me?

Q. Since you had these pictures made, too?

A. This is the first time I have seen them since.

Mr. Stella: I move the Court that they be withdrawn and the Court instruct the jury to disregard those Petitioner's Exhibits 4 and 5.

The Court: Any objection?

Mr. Metzger: We have no objection. They have been shown to the jury and I think the jury should—the most that can be done to cure this error is to tell the jury they have no bearing and it should be—

The Court: Well, the Court will give the ap-



(Testimony of Earl Phillips.)

appropriate instruction. I just asked if you had any [115] objections. The exhibits will be withdrawn, and Exhibits 4 and 5 that were passed to the jury and exhibited to the jury yesterday are withdrawn, and for the reason that they do not have a bearing upon the immediate issues here involved, and you are instructed to disregard them as in any way being of evidentiary value.

Q. Handing you Petitioner's Exhibit No. 9, Mr. Phillips, I will ask you if you know what that is?

A. That is a picture of a portion of the M. & D. Logging road in Section 11.

Q. A portion of the road shown on this map taken by the United States?

A. That is right.

Q. Will you mark that with a red pencil, in the same manner which you have marked the other exhibits?

A. The picture was made from the junction of these two roads (indicating on map).

Q. Will you put the exhibit number on the map?  
(Witness does as directed.)

Q. When was that taken?

A. That was taken at the same time the others were. That was taken August, 1941.

Mr. Stella: That is all.

The Court: Any objection? [116]

Mr. Metzger: No objection.

Mr. Stella: And move it be admitted, Your Honor.

The Court: It will be admitted.

(Testimony of Earl Phillips.)

(Whereupon, picture referred to was then received in evidence and marked Petitioner's Exhibit No. 9.)

Mr. Stella: You may take the witness.

Mr. Metzger: No questions.

(Witness excused.) [117]

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H. D. LA SALLE,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. La Salle?

A. H. D. La Salle.

Q. Where do you reside?

A. Aberdeen, Washington.

Q. How long have you resided in Aberdeen?

A. Nearly 22 years.

Q. And what business are you engaged in?

A. I am in the real estate business, insurance and appraisals.

Q. How long have you been engaged in that business?

A. Ever since I have been in Aberdeen, and some time before.

Q. And who have you appraised property for,

(Testimony of H. D. La Salle.)

Mr. La Salle? When I ask that question, I am referring to property in western Washington.

A. Oh, I have appraised for various different agencies, the Federal Housing Administration, the Home Owners Loan Corporation, and the Federal Public Housing Authority, and the Department of the Interior, United States Army, United States Navy, City of Aberdeen, and City of Hoquiam, State of Washington, various school districts, in the Grays Harbor County, and practically [118] all of the leading institutions on the Harbor at one time or another. I have appraised for both banks at Aberdeen and Hoquiam, and all of the Savings and Loans.

Q. Do you own any cut-over land of this forest land in Grays Harbor County?

A. I have 252 acres, between Aberdeen and Montesano on the highway.

Q. What kind of land?

A. Well, it is covered with second growth, at this time. It was cut-over many years ago.

Q. Now, are you familiar with the property taken in this case?           A. I am.

Q. When did you first examine that property?

A. I first—July of this year that I made a close examination of it to become familiar with it.

Q. Have you checked the records to determine what land the Polson Logging Company owns, through which this right-of-way runs?

A. I have.

Q. And which contains a part of the land taken?

(Testimony of H. D. La Salle.)

A. I have.

Q. Will you step down to the Petitioner's Exhibit 2 on the board, and point out to the Court and the jury which lands they have through which that right-of-way runs, [119] or which contain any lands condemned in this case, and at the same time, you will name the section and the township and the range?

A. Well, it leaves—takes off from the United States Highway 101 in section thirty-five, twenty-one, ten and crosses right through the quarter between—

The Court: Speak a little louder, Mr. La Salle.

A. (Continuing): —it passes through the quarter between the section twenty-six and thirty-six in twenty-one, then enters section twenty-five,—crosses section twenty-five, twenty-one, ten, and goes into section thirty in twenty-one, nine, and crosses at the northwest quarter of section twenty-nine, twenty-one, nine, and it crosses section twenty. In fact that is in section twenty, is where the road—two portions of the road forks, and the one portion of the road that goes up to Donkey Creek crosses the quarter of section twenty-one and the next is a school section. That is not a Polson land. It crosses the southwest quarter of section nine, it crosses the northwest corner of section ten, and along the south of the border of section three and then enters section eleven, all in section twenty-one, nine, and this other branch crosses section seventeen, and eight, and there is another portion of the road over this

(Testimony of H. D. La Salle.)

section one, and it touches the corner of section twelve. [120] Those are in twenty-one, ten. The two tracts that are wider than the ordinary right-of-way, identified as tracts 2 and 3, are in—tract 2 is in section ten, and tract 3 is in section nine, twenty-one, nine.

Q. Now, as to these sections, sections which you have mentioned, is there any evidence they—that you have mentioned, other than section three and four in township twenty-one, nine, which the Polson Logging Company, so far as you know, does not own the whole section?

A. I will have to refer to my record for that.

Section twenty-one, nine, Polson Logging Company only owns the west half of the northwest quarter, and that is the portion that is cut by this right-of-way.

Q. I beg your pardon.

A. I say, in section twenty-one, twenty-one, nine, the Polson Logging Company only owns the west half of the northwest quarter of the section, and that is the portion which the right-of-way passes through.

The Court: Well, will you step down to that map and indicate so the jury and Court can have a better understanding of what part you refer to.

A. The west half of the northwest quarter would be that shape on the map, and that is owned by the Polson Logging Company. The balance of that section is in other ownership. [121]

Mr. Keenan: Will you take a red pencil and show

(Testimony of H. D. La Salle.)

a little hatching—have you got one, which of those are owned by the Polson Logging Company, through which this right-of-way runs?

The Witness: You mean on the whole map?

Mr. Keenan: Yes.

A. Well, they own all of the—how would you like to have that indicated on the map?

Q. Beg pardon?

A. How would you like to have that indicated on the map?

Q. I would take that and hatch it very broadly and cut down and save as much time as possible.

A. All right.

(Witness does as directed.)

Q. Do you know who owns section sixteen in township twenty-one, nine?

A. Well, that is a school section. It belongs to the State of Washington.

Q. Do you know whether or not the Polson Logging Company has the right-of-way across that section sixteen? A. They have had.

Q. Do you know whether they have one now—I mean speaking as of October 22nd, 1943?

A. They did have.

Q. Up to the time when the case was filed? [122]

A. Yes, they did have a permit to cross it.

Q. Do you know when that license or permit would have expired?

A. No, I am not sure. I did look it up, but I have forgotten the date.

Q. Now, will you show us whatever lands abut-



(Testimony of H. D. La Salle.)

ting, adjoining or touching the Polson Logging Company lands that you designated on that map, what other lands are owned by the Polson Logging Company,—talking only, however, of additional lands that adjoin, or abutt on these sections of which you have indicated.

A. Well, I probably can indicate them by showing the other way.

(Witness marking on map.)

Q. Will you, for the sake of the record indicate which sections or portions of sections you are now marking, Mr. La Salle?

A. Well, I marked section twenty-six in twenty-one, ten. This is the north half, and the north half of the south half of section thirty-one, twenty-one, nine.

Mr. Metzger: What section did you say, sir?

The Witness: Thirty-one. This is the north half of the northwest quarter of the southwest quarter, of northwest quarter, and the northwest quarter of the southwest quarter, section thirty-two, twenty-one, nine. [123]

This is all of section nineteen, twenty-one nine.

All of section eighteen, and all of section seven.

The north half of section fifteen, and the north half of the northwest quarter of section fourteen, and I want to correct myself in speaking—in describing the section through which the road passed. The Polson Logging Company do not own this north half of the southwest quarter of section eleven.

They also own the southwest corner of the north-

(Testimony of H. D. La Salle.)

east quarter, the west half of the southeast quarter, and the northeast quarter of the southwest quarter of section four, twenty-one, nine.

I believe that is all.

Q. Do you know, Mr. La Salle, which if any of these lands you have described, are timbered?

A. The only portion of the lands that are timbered is that portion which—section twenty-one, nine.

Q. Will you indicate that?

A. These four forties, in section four have not been logged.

Q. And when you say timber, do you mean have not been logged?      A. That is right.

Q. Did you take any photographs of lands involved here? [124]      A. I did.

Q. When did you take those photographs? Will you hand them to the Bailiff, please?

A. September, of this year.

Q. Mr. La Salle, have you formed any opinion as to whether or not there has been any severance damage to the lands of the Polson Logging Company which you have indicated on that map, by virtue of the taking of the lands in this case by the Federal Government?

A. I did. I naturally took that into consideration, because that is always an element in an appraisal.

Q. What did you determine?

A. I determined that there was no severance

(Testimony of H. D. La Salle.)

damage to the abutting property of the Polson Logging Company.

Q. Now, is any of that land shown on that map, inhabited? A. No, sir.

Q. Are there any houses built on any of the lands, shown on that map?

A. No improvements of that type whatsoever.

Q. Will you describe that lands generally which is shown on the map and which you have hatched in?

A. Well, it is rolling, too, quite broken in places, but generally rolling country. It has been cut over some years back, most of it fully stocked with new growth; [125] some of it practically no re-seeding. Some of it has a fair start of re-seeding.

There is some deep ravines and gullies, of course, is cut by the west fork of the Humptulips, and these various creeks—just a type of a logged over area.

Q. You have in your hand, Mr. La Salle, Petitioner's Exhibit number 10 for identification. That is the lowest number on the back of those cards, is it not? A. Yes, that is right.

Q. Will you explain what that is?

A. It is a picture that I took this fall, standing on the road, the right-of-way in question, and in—pardon, I will show you on the map where it is approximately this location in Section thirty, and facing almost directly south when I took that picture.

Mr. Metzger: Will you please define that location a little more accurately, than pointing at the map and saying "this location."

(Testimony of H. D. La Salle.)

The Witness: Well, it was after we had crossed the Eagles Creek and O'Brien Creek bridges and fill, and there is quite a long straight area in the road there that is fairly level, and it was at that point, that we stopped and I took this picture, before we got to the fork in section twenty. [126]

Q. What Section was that taken in?

A. Taken in thirty.

The Court: Proceed.

Mr. Keenan: I handed counsel all of the pictures, Your Honor. I should have done it before.

The Court: Well, you have only identified one.

Q. What is Petitioner's Exhibit Number 11 for identification?

A. That is a picture that I took right at the fork of the roads in Section twenty, facing practically east, and I was standing right in the intersection.

The Court: I am wondering if this evidence would not be of greater value if it were identified some way or other on the map as it goes along.

Q. Can you indicate on the map where you took the pictures?

The Court: Six, eleven, or some other identification.

Mr. Keenan: As the Court suggests, I would use the number ten for the first one, and eleven for the next one.

(The Witness marks on map.)

The Court: Now, as you identify them, hand

(Testimony of H. D. La Salle.)

them to the Bailiff, and the Bailiff will hand them to Mr. Metzger.

Q. Will you tell us what Petitioner's Exhibit Number 11 is? [127]

A. Number 11 was taken standing right in the intersection of this road.

Q. You have indicated with eleven on that?

A. I have.

Q. Petitioner's Exhibit Number 12?

A. Number 12, I turned around in the same position and took a picture to the northwest.

Q. Have you indicated that on the map?

A. I have.

Q. What is Petitioner's Exhibit Number 13?

A. Number 13 was taken in Section eleven, facing across to the south.

Q. And Petitioner's Exhibit 14?

A. Number 14, I was near the end of the road, facing exactly south. We set the compass on it, and the background on that picture shows some re-foresting which was in this eighty.

Q. And where are you pointing?

A. That is in the south.

Q. Will you indicate on the map where you were on Exhibit 14? A. Yes, sir.

Q. And 15, Mr. La Salle?

A. Number 15, I stood in the same position and faced west.

Q. And 16? [128]

A. Number 16 was taken in tract 3, in section

(Testimony of H. D. La Salle.)

nine. I stood on the right-of-way and faced in a southeasterly direction.

Q. 17?

A. 17 is the picture of the gravel bank going down to the river. The road is cut right along side of the bank and I just took it to indicate, because this area was being taken for gravel purposes, to indicate what type of gravel there is there. It was in the—approximately this location. (Indicating.)

Q. For the record, where were you looking.

A. In the west part of section nine.

Mr. Keenan: Is that all of them?

The Witness: That is all.

Q. And were all of these pictures taken on the same day? A. They were.

Q. They were all taken by you?

A. They were.

Q. And all of them, either depict—all of them were taken from the road?

A. I was standing in the area in question when every one of the pictures was taken.

Mr. Keenan: At this time the Government offers in evidence Petitioner's Exhibit numbered 10 to 17 for identification, inclusive. [129]

The Court: Any objection?

Mr. Metzger: Just a moment, Your Honor, please.

Where did you say picture Exhibit for identification 13 was taken? I don't see it marked here—Oh, I see it now.

The Witness: There. (Indicating.)



(Testimony of H. D. La Salle.)

Mr. Metzger: I see. No objection.

The Court: They will be admitted in evidence.

(Whereupon, pictures referred to was then received in evidence and marked Petitioner's Exhibit Nos. 10-17, incl.)

Q. What in your opinion is the highest and the best use of the land being condemned here, Mr. LaSalle?

A. Growth of forest products, re-forestation, and a trail for fire prevention.

Q. Are you generally familiar with the values of cut over land in western Washington?

A. I am.

Q. And how did you acquire that familiarity?

A. By my own transactions and searching the records for market data, sales of comparable properties.

Q. What have you done, specifically to prepare yourself to testify to values in this case?

A. I have checked the records of Grays Harbor County [130] for the sales—of transfers of property in this area immediately around the take, all of section—all of township twenty-one, nine, a portion of section—or township twenty-one ten, and some surrounding areas.

Q. Can you tell us—I'm not sure whether I asked this question before or not. Can you tell us what portion of the Polson Logging Company lands shown on that map are timbered? Did I ask that question? A. You did.

Mr. Keenan: All right.

(Testimony of H. D. La Salle.)

Q. Well, have you formed an opinion as to the fair cash market value of all the lands condemned here in—in the condition it was when the Government took it in this case, and speaking as of a valuation date of October 22nd, 1943?

A. I have.

Q. And what in your opinion, is the fair cash market value of the lands taken in this case on that date?

Mr. Blair: To that we object, Your Honor, on the ground that the witness has not shown himself qualified to testify. I would like to interrogate the witness briefly as to his qualifications.

The Court: The Court is satisfied that he is.

Mr. Blair: Your Honor, please, the evidence [131] in this case now shows that this property was not logged off land at the time of the taking. It was a truck logging road, being used as such at the time the Government took it, and that fact is conceded here—brought out by the testimony of the Government's own witnesses, and to permit a man to testify to its valuation as logged-off land, when it was a truck logging use, of course, is improper.

The Court: If the question does not imply that it should, or you should be permitted—

Mr. Blair: I think the question clearly did not.

(Question read.)

The Court: I think that implies the conditions in which this entire right-of-way was, as taken.

Mr. Blair: I did not question it, and the witness in attempting to show his qualifications, said that

(Testimony of H. D. La Salle.)

he had made an investigation as to what logged-off land was worth. Clearly this was not logged-off land. It was a logging road.

The Court: He may answer, and you will have an opportunity to cross examine.

Mr. Blair: An exception, Your Honor.

A. I consider on that date the land was worth a dollar an [132] acre, \$273.96.

Mr. Keenan: You may cross examine.

### Cross Examination

By Mr. Blair:

Q. Mr. La Salle, in arriving at that figure of a dollar an acre, what did you taken into consideration?

A. As I said, I have checked the record for transactions on all the land in that vicinity, and the sales during that period did not amount to a dollar an acre.

Q. Mr. La Salle, did you ever own a logging road?      A. I never did.

Q. Did you ever build a logging road?

A. I never did.

Q. Have you any conception of what it costs to build logging roads?

A. Not close enough so that I would want to give you a figure on it.

Q. Did you ever buy a logging road?

A. I never did.

Q. Did you ever sell a logging road?

A. I don't think I ever did.

(Testimony of H. D. La Salle.)

Q. In arriving——

A. I have bought right-of-ways.

Q. In arriving at the opinion you have expressed here, [133] of a dollar an acre, you did not take into consideration at all the fact there was a logging road on this land, did you?

A. Yes, sir.

Q. What consideration did you give that fact?

A. I have found out from my investigation, although I was only over it, pretty well the condition the road was in at the time of the taking. I have been over the road in its present condition. In my opinion the Polson Company has a lot better road than they ever would have under—their ownership, and they are certainly exercising proprietorship over it, they tried to kick me off of it.

Mr. Blair: I move the last remark be stricken.

The Court: Stricken.

Q. So, it is your conception that the Polson Logging Company has now a better road than it had had?      A. Yes.

Q. However, the Polson Logging Company does not have any road any more, does it?

A. They certainly have the use of a road.

Q. They have the use of a road?

A. Yes, sir.

Q. It is because they have now the use of that road, you place this figure of \$1.50 an acre in?

A. That is right.

Q. In your testimony here?

A. Yes, I figured they have not been harmed a

(Testimony of H. D. La Salle.)

particle by the Government's taking. They have a finer road than in 1940, which they are using.

Mr. Blair: At this time we move to strike the entire testimony of the witness as to market value because he has not placed his market value on the property that has been taken by the Government, but has attempted to assume that that property has not been taken.

The Court: The motion will have to be denied and an exception allowed.

Mr. Blair: Exception.

Q. Mr. La Salle, generally speaking what is north of it, and the water basin or watershed through which the road that is under contemplation travels—what is to the north of that?

A. National Forest.

Q. There are private timber ownerships in the National Forest, of course?      A. Some.

Q. And that this is an unlogged forest?

A. Yes, sir.

Q. A mature forest?      A. Yes, sir. [135]

Mr. Keenan: If the Court please, this is objected to, what land is forested in the north. That is not the property of the Polson Logging Company, or not abutting or adjacent to any property taken here, and is not properly a question of inquiry in this case.

The Court: Objection will be overruled, and an exception allowed.

Q. Do you know what quantity of timber there is in that watershed, and that will be logically and

(Testimony of H. D. La Salle.)

in due course probably removed over the road that is being condemned here?

A. Oh, I have heard it estimated, but there are other witnesses better qualified to answer, because I am not in the Forestry Service.

Q. Speaking generally now of the watershed area to south, south of the forest—the area that is contiguous to, and served by the road that is under condemnation here. You say that area generally is a logged-over area? A. That is right.

Q. And it has been logged-over from 10 to 30 years?

A. Well, some of it may have been logged as long ago as 30 years. I doubt it. Some of it has been logged in less than 10 years, some of it that has no re-seeding yet at all. Maybe that is because of burns.

Q. But, the substantial part of it was logged 10 to 30 years ago?

A. Well, there is a cutting record in the Court to tell exactly. I wouldn't want to testify to exactly the cutting dates.

Q. That area generally is known as the Polson Tree Farm?

A. I think they consider it.

Q. Do you know how that tree farm compares with the other tree farms in the Douglas Fir region?

A. Oh, I have been in the Schaffer Tree Farm, and I have been in the Clemons Tree Farm, and I think it is comparable?

Q. As a matter of fact, isn't that considered by



(Testimony of H. D. La Salle.)

forestry men the equal of any tree farm in the Douglas Fir area?

A. The forestry men would have to answer that.

Q. You don't know about that?

A. I don't know about that.

Q. You have never been in the logging business?

A. No.

Q. You are not a forester?           A. I am not.

Q. People are buying lands that have been logged-over upon which there is regrowth timber, for the purpose of managing and protecting that forest, and ultimately harvesting it, aren't they?

A. The last three or four years there has been quite a little activity in picking up lands that previously went to the county for taxes, for tree farm purposes. I don't know, but anyway, they have been buying it up.

Q. And holding them with the expectation that they will ultimately harvest that crop and make a profit?           A. I grant you somebody did.

Q. About when do you think the first harvest will be taken of this Polson Tree area?

A. Outside of the Cascara bark, I think it will be very long——

Q. You think it will be a very long time?

A. Yes.

Q. That is one of the assumptions you had in mind when you fixed the market value?

A. A dollar an acre is the market value. In fact, the County still owns some in there.

Q. When you valued this, you gave no consid-

(Testimony of H. D. La Salle.)

eration at all to the cost of the road that the Polson Logging Company had in there?

A. No, the road that they had in there prior to the M. D. coming and fixing it up so they could take out that timber, it was an abandoned grade. It is a matter of reforesting like anything else, but of course, the M. D. came in and fixed it up so they were able to take some timber out of it. [138]

Q. Now, was the M. and D. taking timber out of the National Forest?

A. They took M. and D. and took some of the National Forest.

Q. Another logging operator by the name of Johnson took timber out of the National Forest and used that road to remove it?

A. I think he used the west branch.

Q. And paid the Polson Logging Company a fee for the use of the road? A. I don't know.

Q. Anyway, it was used by loggers to remove logs previous to the time the Government took it.

A. I know it was previous to that, I don't know as to the time.

Q. When you put the value on this, you ignored the fact that this was a logging road?

A. I did not give any value to it as a road.

Q. You did not give it any consideration, as to that element of value? A. That is right.

#### Redirect Examination

By Mr. Keenan:

Q. How many logging roads there in Gray Harbor County?

(Testimony of H. D. La Salle.)

Mr. Blair: Objected as immaterial. [139]

The Court: Objection sustained. The witness has not shown himself qualified to answer that. The question is not pertinent here.

Q. Have you sold land in Grays Harbor County that had logging roads on them?

Mr. Blair: We object to that as immaterial, Your Honor.

The Court: Oh, I think he may answer.

Q. What other lands and what logging roads maybe——

The Court: He is confined in this same general region.

A. I have bought lands in tax resale that had abandoned railroad grades on them, if that is what you mean.

Mr. Keenan: I think that is all, Mr. La Salle, thank you.

(Witness excused.) [140]

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LEONARD D. BLODGETT,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Blodgett?

A. Leonard D. Blodgett.

Q. Where do you live?           A. Olympia.

Q. And by whom are you employed?

(Testimony of Leonard D. Blodgett.)

A. By the United States Forest Service.

Q. And in what capacity?

A. I am—my title is Forester. I am with the Supervisor's staff.

Q. And did you make a cruise of the Polson timber in Section 4, Township 21, North Range 9 West?

A. I did.

Q. And when was that cruise made?

A. It was made about the middle of October.

Q. What year?           A. This year, 1945.

Q. Now, will you tell us—give us a brief resume of your experience in surveying in the timber business, at the time you first went out in a survey party, or anything [141] to—

A. Well, I worked for the Forest Service for twenty-eight or nine years.

Q. Well, will you speak up so the jury can hear you?

A. I worked in the Forest Service for twenty-eight or nine years, and previous to that I worked for the Department of Interior on a surveying party—on several surveying parties, for about five years, and during the time that I have been in the Forest Service—

Mr. Keenan: It is very hard to hear you.

A. (Continuing): During the time I have been in the Forest Service I have had considerable experience in cruising timber. I have made a good many cruises, and mapped timber.

The Court: Speak louder now, so we can all hear you. I am having difficulty.

(Testimony of Leonard D. Blodgett.)

Mr. Keenan: I did not hear the last answer.

The Witness: I say, that during the time that I have been with the Forest Service, I have had experience in cruising timber and have cruised a great many tracts during that time.

Q. Well, during this period, which branch of the Forest Service have you been in most of the time?

A. In timber management.

Q. What does the timber management branch of the Forest [142] Service do?

A. That sells the timber, and plants the areas. In other words, administers the selling and everything to do with the timber stands and sales.

Q. And in order to handle these sales of timber, is it necessary for the Forest Service to have a cruise?

A. Yes, that is right. To sell them, we have to.

Q. And what if any check is made on those cruises?

A. Well, the timber is cut. We can check it against the actual scale.

Q. Well, now, what do you mean, the actual scale?

A. Well, when the timber is cut the logs are paid for on a scale. They are scaled and paid for on the basis of the actual scale volume.

Q. Now, what kind of a cruise did you make as to this section of Polson timber in Section 4, Township 21, 9 West? I mean, in percentage?

A. Ten per cent.

Q. Ten per cent, and what is your estimate as

(Testimony of Leonard D. Blodgett.)

to the amount of timber owned by the Polson Logging Company in the three forties I think it is, is that right, which they own in Section 4?

A. Four forties.

Q. Four forties, in Section 4, Township 21, North Range 9 West? [143]

A. I estimated 2,700,000.

Q. 2,700,000 what? A. Of all species.

Q. Board feet? A. Board feet, yes.

Q. And will you give us the break-down of that figure 2,700,000 by species?

A. I have it here. That was 1,116,000 hemlock, 61,000 cedar, 1,496,000 spruce, and 24,000 Douglas fir. Total,—exact total is 2,701,650.

Mr. Keenan: You may cross-examine.

Mr. Metzger: No cross-examination.

Mr. Keenan: That is all, Mr. Blodgett, thank you.

(Witness excused.)

The Court: It is now time for the morning intermission, so we will take a recess for fifteen minutes, gentlemen of the jury.

(Recess.) [144]

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W. H. ABEL,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Your full name is W. H. Abel?



(Testimony of W. H. Abel.)

A. Yes.

Q. And where do you live, Mr. Abel?

A. At Montesano.

Q. And you practice law? A. Yes.

Q. Do you? A. Yes.

Q. At Montesano? A. Yes.

Q. How long have you practiced law at Montesano? A. Fifty-two years.

Q. And Montesano is the county seat of Gray Harbor County? A. It is.

Q. During the period that you have practiced law at Montesano, have you had among your clients loggers and mill men? A. Quite a number.

Q. What logging companies have you represented?

A. Polson Logging Company, Simpson Logging Company, Schafer Bros. Logging Company, and Weyerhaeuser Timber Company, and a lot of others, Anderson-Middleton Company, and a lot of others.

Q. Have you bought and sold timber land on your own account? A. I have.

Q. And over what period of time?

A. Approximately forty-five years.

Q. And have you bought and sold timber land for the account of others? A. I have.

Q. And have you bought and sold cut-over land?

A. I have.

Q. For your own accounts?

A. For my own account, yes.

Q. Do you know the condition of this road, and the land abutting on the road as shown by the Pol-

(Testimony of W. H. Abel.)

son Logging Company at the time the Government took over the road?

A. That is on February 2nd, 1942?

Mr. Metzger: Object, if Your Honor please, as immaterial and irrelevant. We are concerned with the date as of October 22nd, 1943.

The Court: Well, it is not in dispute the [146] Government took an easement in February, and a fee in October.

Mr. Metzger: Yes, we dispute that. Your Honor has held that and set it aside, and that record stands. That taking has been set aside by this Court, and has never been modified.

The Court: The legal phases of it—the actual facts though are what we are concerned with here, and I shall overrule the objection and allow you an exception.

Mr. Metzger: There is no proof the Government took it over on that date, and they did not do anything with the road, and there is proof before this Court that they did nothing with the road until after November, 1943.

The Court: The objection will be overruled and exception allowed.

Mr. Metzger: Allow us an exception.

Mr. Keenan: You may answer the question.

A. Just what is the question?

Mr. Metzger: Object to that as assuming nothing in evidence. There is no evidence the Government took it at that time.

The Court: I am going to sustain the objection

(Testimony of W. H. Abel.)

in the form the question was asked. If you want to [147] ask the question as to the particular time—the question is vague in the form you asked it.

Q. Do you know the condition of this road in February of 1942? A. I do.

Q. Will you tell us what condition this road was in, in the month of February, 1942?

Mr. Metzger: Object as irrelevant.

The Court: Overruled.

Mr. Metzger: We are concerned with the value as of the time of taking.

The Court: Objection will be overruled and exception allowed, Mr. Metzger.

Mr. Metzger: I cite the decision of the Circuit Court of Appeals for the 9th Circuit.

The Court: The Court has ruled Mr. Metzger.

A. On February 5th, M. & D. Timber Company—that company consists of myself and my son, Clyde Abel, under authority of the Government and under a Government permit, entered into possession of the road and put it in condition.

Mr. Blair: Object.

A. (Continuing) On that date.

The Court: Proceed.

A. (Continuing) We started—— [148]

Mr. Blair: Move that the answer be stricken as not responsive to the question.

The Court: Motion will be denied and exception allowed.

A. The road had been unused over the winter. It had been previously used by M. & D. Timber

(Testimony of W. H. Abel.)

Company, and that company had a private condemnation suit to condemn an easement over it.

The Court: I don't think—I doubt whether these facts are material, unless they go to the credibility of the witness.

Q. Can you tell us exactly what shape it was in?

A. It was in——

Q. In February?

A. It was not in good shape. It was not usable without being placed in condition. Our company placed it in condition for use, and after certain proceedings in April, whereby we bought timber from Polson Logging Company at the southeast of 3——

Q. What year are you speaking of?

A. I am speaking of '42—1942, M. & D. Timber Company used the road, maintained it, put it in usable condition and kept it so at its sole expense, until the first take order was vacated. During that time we took out a lot. The country was at war and we took out [149] timber for the Forest Service. We also took out our timber which we had owned otherwise. We took the timber from the south half of the northwest quarter and the north half of the southwest quarter of Section 12, which we owned. We took off the timber from the south half of the southwest quarter of Section 12, and the northwest quarter of Section 13 in this township and used the road continuously from April 8th until we were notified that the Government's first take order was—had been vacated, and we stopped, and we have

(Testimony of W. H. Abel.)

never used it since for the hauling of logs. All of that operation was under Government permit, and maintenance charge which we paid the Government. The Government maintained a bar at the road. There was a complete taking early in February. The road was posted as a Government road. We submitted to regulations by the Government. We did what the Government directed us to in putting these so-called unsafe bridges——

Mr. Metzger: Your Honor, this is wholly immaterial, and move to strike this as not responsive.

The Court: Yes, it is not responsive.

Mr. Metzger: Not binding upon the respondent in this case in any event.

Q. Mr. Polson—beg your pardon, Mr. Abel, when did you [150] first start using this road?

A. In either April or May, of 1939.

Q. And was that arrangement made with—was the arrangement made with Polson whereby you could use it? I just like to know whether there was such an arrangement?

A. Yes, but the arrangement was with A. M. Abel, who was my brother, who had timber which we purchased. That was back in '39.

Q. And when you took over, what condition was the road in at that time?

A. It was not travelable at all. One could go over it by foot, no other way.

Q. Was it then——

Mr. Blair: You are talking about 1939?

Mr. Keenan: That is right.

(Testimony of W. H. Abel.)

Mr. Blair: We object.

The Court: Objection will be overruled.

Q. Was it then a railroad or truck road?

A. It was neither. There was an unused grade. The bridges were not decked.

The Court: I think he should limit himself to particular roads here.

Mr. Keenan: I am talking about the road, Your Honor, and Mr. Abel, that is being taken here in this case. [151]

The Court: Very well.

A. (Continuing) May I delineate on the map the portion that I am talking about?

Mr. Keenan: That is right, please.

A. Commencing at the intersection with the Olympic Highway, the line that is marked "A" to the end of the green line there.

Q. Was the steel there at that time, Mr. Abel?

A. There was not.

Q. The rails had been picked, then?

A. Yes.

Q. And the road was subsequently—the road bed was subsequently converted to a truck road?

A. M. & D. Timber Company did that prior to the Government taking over, prior to February 2nd, 1942.

Q. Now, what is meant by a tree farm, Mr. Abel?

A. Well, that expression——

Mr. Metzger: Object, if Your Honor please. The witness has not shown himself qualified.

A. Well, as applied——



(Testimony of W. H. Abel.)

The Court: I think he has, sufficiently. You may answer the question.

A. As applied to this case, I never heard it until this morning, the Polson Tree Farm.

Q. What is generally meant by a tree farm?

A. It is a term that has come in use whereby a lot of tax title lands have been sold as one block, and the buyer uses it to let trees grow on it. There is several such in Grays Harbor County. They are not farms—at least, are not planted, but they are just permitted to let nature take its course.

Q. There are some instances where trees are planted?

A. Yes, sir, on the Clemons, there was some slight planting.

Q. Are you familiar with the prices paid for cut-over land in Grays Harbor County?

A. I am.

Q. For a period of recent years?

A. Over a period of quite a number of years.

Q. And how did you acquire that familiarity?

A. By buying, principally.

Q. And do you own any land at the present time in Township 21, North Range 9 West?

A. With my son. We own quite a lot.

Q. And some land in adjoining townships?

A. Yes, in 29, in 20, 11, and 19, 9, and 20, 11 and in several other townships in the general territory.

Q. Have you ever bought or sold a truck road?

A. Yes, sir.

Q. Beg your pardon? A. I have. [153]

(Testimony of W. H. Abel.)

Q. Have you ever bought or sold a logging railroad? A. I have.

Q. Generally speaking, how do they appraise a truck road?

A. It depends upon whether the owner of the road has any timber of his own, or that he can control, come over the road. There are hundreds—indeed hundreds of miles of roads in Grays Harbor County where the owner has ceased to use them—has no more timber to come out, and then the road beds are just land—just land.

Q. And how do they appraise logging railroads?

A. Well——

Q. For sale purposes.

A. Well, that depends.

Q. I am talking about railroads at this point.

A. Well, that depends upon whether——

Mr. Metzger: I object as improper, how they appraise—asking how somebody else does it is incompetent.

The Court: I think it is.

Q. Generally speaking, Mr. Abel, what is the basis upon which the price—the price at which a logging railroad is sold, is arrived at?

Mr. Metzger: Object again, for the same reason.

Q. In southwestern Washington? [154]

Mr. Metzger: This is asking for hearsay testimony as to what other people do, with which we cannot cross-examine upon.

The Court: Oh, I think I will let him answer. The jury will understand that all of these are just

(Testimony of W. H. Abel.)

merely opinions and not facts, and the testimony of them in an eminent domain case is one of opinion. The question of what weight or value to be given to it is dependent upon the qualifications of the person giving the opinion.

Mr. Metzger: In this particular instance, the witness is not being asked his opinion. He is being asked what other people generally——

The Court: If the question is intended to be in the form which you indicate, I shall sustain the objection.

Mr. Metzger: That is the question.

Q. Mr. Abel, how many sales do you know of, of either a logging railroad or a logging truck road in Grays Harbor County, or any county adjoining Grays Harbor County?

A. I have had during the past thirty or forty years, I have either sat with the buyer or the seller on quite a number.

Q. How many would you estimate?

A. Well, I never added them up. I could rattle them off [155] and give you the name.

Q. All right, will you name them, please?

Mr. Metzger: Object, if Your Honor please.

A. I can give you the names.

Mr. Metzger: As immaterial and irrelevant. Thirty years is too remote in time, Your Honor will take judicial notice that truck logging thirty years ago was unknown. There were not any.

The Court: The objection will be overruled, and of course I do not expect him to go into any elaborate

(Testimony of W. H. Abel.)

details, but the question goes to his qualifications to answer the ultimate question, I assume.

Mr. Metzger: Allow us an exception.

The Witness: State the question.

Q. Which is referred to truck roads. I refer to the sales of either logging railroad, or a logging truck road, where you are familiar with the details, either through representing the buyer or the seller or any other capacity.

A. There are so many varying factors. Trucking has only come into being in the late years, and very often old railroad grades have been converted into trucking roads. The first and perhaps most typical that I would give, would be the Donovan Logging Company, commencing at tidewater on the Wishkaw River, extending north to [156] approximately Section 22, in 21, 8, the township to the east of this township. I had had much familiarity with that road, and the previous ownership of that road, and the rights of way for a period of a good many years, when that company and its railroad was headed right into the National Forest. That is, it could have been extended right into the National Forest. Lacking timber, it quit. The rails were taken up and sold as rails. The railroad grade with bridges and trestles are still there, and are of no value whatever, because there is no timber to come over the road—no timber controlled by the owner of the grade. I was employed, shall I say, to try to sell that as an existing, operating—as an existing unit, capable of operation to serve the Grays Harbor

(Testimony of W. H. Abel.)

market from the timber in this identical National Forest six miles to the east. Being unable to get a supply of timber, I couldn't sell the road, and it was junked.

Q. What other sales have—

A. To the west of this road—to the west of this township, possibly six or nine miles west, I represented for many years the Copallis Lumber Company.

Mr. Blair: Now, if the Court please, this has gone far enough.

The Court: I think I shall sustain the [157] objection to the question.

Q. Just tell us briefly, Mr. Abel, the sales that you are familiar with of logging railroads or logging truck roads, just where the operation was located, the name of the company that maintained the operation. I don't want any of the details of the sales themselves at this time.

A. Well, I am not sure that I can just without amplying, telling you I can give you the factual set-up, of the Mason County Logging Company, Vance Lumber Company, and the railroad was valued with the steel in place, although that was an operating company—

Mr. Blair: If the Court please, we object as not responsive to the question. The question is what—

The Court: All these questions I assume go to the qualification of this witness to answer the ultimate question that you are going to ask him as to his

(Testimony of W. H. Abel.)

opinion as to the value of the property here in question?

A. I sold the Lytel Myrtle Logging Company for the value of the steel upon it some years ago.

Mr. Blair: The witness is a lawyer and he knows the objection. We ask that the answer be stricken.

The Court: The answer will be stricken.

Q. As I understand the Court, Mr. Abel, you are only to testify at this time to the sales of logging railroads or truck roads that you are familiar with, and simply as that has a bearing on your qualifications to testify to the value here.

A. I know of several sales of land with grades upon them that are unused,—no timber, by the owner of the grade, being over it.

Q. Now, have you purchased any property in the vicinity, of a similar character to the property involved here in recent years?      A. I have.

Q. And where is that property?

A. I purchased the south half of the southeast half of Section 11, the north half of the northeast of Section 14, from Washington-California Company, some three years ago, about the time that this matter came up.

Q. And you say you are talking about Sections 11 and 12 in this township?

A. No, Section—that is Sections 11 and 14 in this township. That makes 160 acres in square form.

Q. And what was the date of that purchase?

A. I have the deed in my portfolio. I haven't it, but it was about three years ago. [159]



(Testimony of W. H. Abel.)

Q. It was three years ago?

A. Yes, two or three years ago. That is the land lying alongside some of this land.

Q. And was that a voluntary sale?

A. Yes.

Q. And the part of the seller? A. Yes.

Q. There was no compulsion on the seller's part to sell? A. No.

Q. What was the consideration that was paid?

A. It was \$100.00 for the 160 acres, plus the taxes against the property, which made it, I think, about \$165.00 for the 160 acres. That is perhaps the nearest.

The next is the south half of Section 13, except the southwest of the southwest, and that was two or three sales, and I purchased that at somewhat less.

Q. What is the date?

A. Shortly—a year or two before some of the——

Q. A year or two before the first sale that you mentioned?

A. Yes, I have it. I shall be able after lunch to give you the date, if you desire. That is also in the same township.

Q. And who were the sellers there?

A. The County. [160]

Q. What type of sale was it?

A. I did not hear that.

Q. What type of sale was it, these county owned lands? A. Yes, public auction sale.

Q. And the title was in the County?

(Testimony of W. H. Abel.)

A. Yes.

Q. What was the consideration there?

A. Well, I think 160 of that was \$125.00.

Mr. Metzger: I think that is improper. That was a County sale after a foreclosure for taxes.

A. A resale.

Mr. Metzger: I object to that as incompetent.

The Court: He may answer.

Mr. Keenan: As I understand the witness, the land was owned by the County and was sold at public auction, and I don't think that the County stands in any position——

The Court: The Court has overruled the objection, let's proceed. Exception allowed.

A. The south side of the township east of Hump-tulips.

Q. Mr. Abel, the question which I asked and which was objected to, was, what was the consideration that you paid?

A. I have not in memory the exact figures. I can supply them after lunch, but for 160 acres I am sure it was [161] \$125.00, and the three forties, varying prices. I can't remember. I would say under a dollar an acre.

Q. What other sales? Would it be easier for you to testify to these sales after lunch?

A. Not a bit.

Q. What other sales did you participate in?

A. Within about a year or so, in the township to the south through John Escalie, I bought from W. E. Boge of Seattle, and the heirs of his nephew's estate,

(Testimony of W. H. Abel.)

some 1600 acres at a dollar an acre, plus the taxes. The taxes ran up another dollar. That was in——

Q. I didn't understand how high the taxes ran.

A. I think that was perhaps nearly another dollar in that instance, but that was a well blocked tract of some 1600 acres, and my deal with Mr. Escalie amounted to this: He made the purchase——

Mr. Metzger: Object as immaterial and irrelevant.

The Court: Yes, I sustain the objection.

A. Over to the east a ways, about a month ago, I bought——

Mr. Metzger: I object, if Your Honor please, as not properly defined, "over to the east a ways".

A. I will. The property was the west half of Section 12, and all of Section 18, of 19, 7. I purchased that for \$500.00, some 900 acres—\$500.00 plus the taxes. [162]

Mr. Metzger: Not the same vicinity, or the same character of land.

The Court: I don't know from his description whether they are in the same vicinity or not.

Q. How far is this last property that you just described, from the property here in question?

A. The one in 19, 7, and this is in 21, 9, that would be two townships north and two east—yes, two east.

Q. Then, is all of this land that you are speaking of, cut over or reforested?

A. Cut over and in various stages of reforestation.

(Testimony of W. H. Abel.)

Q. And do you have in mind any other purchases that you made of land in the vicinity of this land, the land being of the same character as the land here in dispute?

A. Yes, in Township 21, 10. That would be the township in which this road originates, Section 17, I have three forties which I think I bought for \$660.00. There is a good growth of timber on that, merchantable timber.

Q. When was that sale?

A. I am under the impression that that was about three years ago. I can supply you with the exact date.

Q. Do you have in mind any other sale where you were the purchaser?

A. Yes, I bought a good many thousand acres, but I haven't just the details before me, just south of Humptulips City, [163] just west of Humptulips City—I bought some nearer market than this—nearer civilization than the land involved, within the past two or three years. I bought considerable amounts at from 50 cents an acre up to a dollar, or perhaps a little more an acre.

Q. What in your opinion is the highest and best use for the lands which the Government has condemned here in this case?

A. It is for the natural growth of a new forest.

Q. In your opinion, has the Polson Logging Company suffered any severance damage by the taking of this road?

A. Not any. This is a mountainous country. It

(Testimony of W. H. Abel.)

is severed by the West Humptulips and its two branches, the Donkey Creek and West Humptulips. It is severed by—that whole area is severed by the high spur or mountain ridge that extends northeast and southwest. Just south of it—southeasterly of this road there is—the road sought to be built, is really a Chinese wall which prevents getting across from one side of the road to the other. There is really no damage to the other, but a very substantial benefit.

Mr. Metzger: Your Honor please, I move to strike the last statement.

The Court: I do not think it was responsive. It will be stricken and the jury instructed to disregard [164] it.

Mr. Metzger: Move the jury be instructed to disregard it as a voluntary statement.

The Court: Yes, the jury are so instructed.

Q. In your opinion, has the Polson Logging Company suffered any severance damage by virtue of the taking of Tract 2 and Tract 3?

A. I think not.

Q. Have you formed any—in your opinion, how long will it be before the lands owned by the Polson Logging Company, hatched in red on Petitioner's Exhibit 2, will have any logs that can be taken off of it, of sufficient size, including, however, the timbered section portion in Section 4, in 21, 9?

A. Well, that is long years in the future, unless there may be some trees on the ground—some wind-falls or salvage material that could be reclaimed

(Testimony of W. H. Abel.)

after being on the ground for years, that I don't know, but so far as the new growth is concerned, it is a long time.

Q. Have you formed an opinion as to the fair cash market value of all the property taken by the United States in this proceeding as of October 22, 1943? A. I have.

Q. The road being in the condition that it was, when the Government took it? [165]

Mr. Metzger: I object, if Your Honor please, as irrelevant. The question is the value of the property as of the time taken, to-wit, October 22, 1943, that is the Court's order.

The Court: Objection will be overruled.

Mr. Metzger: Allow us an exception.

The Court: Yes, you will have exceptions to all adverse rulings—both sides will.

Mr. Keenan: I beg your pardon, have you answered the question?

The Witness: I have an opinion.

Q. What in your opinion was that fair cash market value, speaking as of October 22, 1943?

A. I am satisfied that a dollar an acre is a good, fair value for the land as land. If there is any value for—as a truck road, that depends upon whether there would be any logs trucked over it which are controlled, as I understand it, by Polson Logging Company. There is in 4, they have a little timber there which could be taken out in a couple of months—one side, so I see no value to an old grade, when the owner of the grades does not control the timber



(Testimony of W. H. Abel.)

to come over it, so I don't give any value to the road as such. The bridges could not be salvaged.

The Court: I think you have answered the [166] question.

Q. What would be your total value, then?

A. Oh, possibly \$300.00. I don't know the exact amount of acreage. I did not pay attention to it.

Q. Assuming that it is two hundred and seventy-six and a fraction?

A. I would say a dollar an acre.

Mr. Keenan: 273.96.

You may cross-examine.

The Court: It is so near the noon hour, I do not think—and I assume the cross-examination will be somewhat extended?

Mr. Blair: Yes.

The Court: So we will take the noon intermission, and if it does not inconvenience the parties, the jurors or the parties, we will reconvene at 1:45, instead of 2:00.

The court will be in recess until 1:45.

(Recess.)

1:45 o'clock p.m.

The Court: Have you completed your direct examination, Mr. Keenan? [167]

Mr. Keenan: I had, Your Honor.

The Court: You may proceed with the cross-examination.

(Testimony of W. H. Abel.)

Cross Examination

By Mr. Blair:

Q. Mr. Abel, I understand that your son and your brother are the M. & D. Timber Company?

A. No, my son and myself.

Q. Your son and yourself?

A. And Mrs. Abel, my wife. We are the sole stockholders.

Q. Of the M. & D. Timber Company?

A. Yes, sir.

Q. And it was in 1939 that M. & D. Timber Company made an arrangement with Polson Logging Company to use a portion of the roads that are under condemnation in this case?

A. No, the arrangement which was in writing, was with A. M. Abel, who was the owner of a half section of timber within the National Forest.

Q. That timber was in the National Forest?

A. Yes, sir.

Q. And that arrangement—that arrangement was made in 1939?

A. I think in February. Our arrangement was made in April, but the arrangement between A. M. Abel and Polson Logging [168] was in February of '39, I think.

Q. And M. & D. Timber Company later succeeded?

A. To an assignment from A. M. Abel.

Q. From A. M. Abel?           A. Yes, sir.

Q. And did go in there and log timber and take

(Testimony of W. H. Abel.)

it out over the road that is under condemnation—a portion of the road that is under condemnation in this case?      A. That is correct.

Q. And in consideration of the right to use that road, A. M. Abel and his successor the M. & D. Timber Company was to pay 50 cents a thousand—

Mr. Keenan: Object. This is simply injecting the tolls that were charged by the Polson Logging Company for a private operator to use this road, and simply an attempt to capitalize on tolls received, in determining the value of the road.

The Court: The objection will be overruled.

Q. Mr. Abel, the arrangement was that in consideration of the right to use that road, you were to pay 50 cents per thousand for the timber brought out over it, and in addition you were to put it in shape and maintain it as a truck logging road?

A. That was some of the considerations. The arrangement was in writing. Those are a part of it. [169]

Q. A part of the consideration?

A. A part of it.

Q. And how many thousand feet of timber did you bring out over the road, pursuant to that agreement, approximately?

A. Well, I haven't the figures before me, but—have you a statement. because I probably could—

Q. Well, the—

A. (Interrupting): I just don't remember the exact amount, but we logged nearly all the A. M. Abel lands except perhaps sixty or eighty acres.

(Testimony of W. H. Abel.)

Q. Well, the toll amounted to about \$900.00, didn't it?

A. A great deal more than \$900.00.

Q. A great deal more than \$900.00?

A. Why, certainly.

Q. Do you have any recollection of how much it did amount to?

A. No, I do not, but my general impression—of course, that is indicated by a number of other factors, because we took out other timber, too, until finally we had bought about all the private timber and logged it in the basin.

Q. Do you recall how much you paid, on the basis of 50 cents a thousand, under that 1939 agreement?

A. No, I do not. It never occurred to me—I can supply [170] that, but not while I am on the stand now, nor do I have it here now, but we paid 50 cents a thousand on all we took out.

Q. In addition to that, you converted that road to a truck road and maintained it as a truck road?

A. Yes, it was, yes.

Q. Can you tell me approximately how much you spent in converting that to a truck road and maintaining it as a truck road?

A. In a general way, I think, yes.

Q. Approximately what? A. I think so.

Q. Approximately what?

A. Well, I would say somewhere between twelve—

Mr. Keenan: If the Court please, that is ob-

(Testimony of W. H. Abel.)

jected to, how much Mr. Abel spent in putting an abandoned or a railroad grade to a truck road. It has no value on the present value of it.

Mr. Blair: He testified——

The Court: This work was all done before the Government——

Mr. Blair: It is material for two reasons. He testified on direct over our objection—he did testify that he did go in and convert it from a railroad to a truck road, and further, he testified that [171] that——

The Court: What the Court wants to know, Mr. Blair, if this implies money that he spent before the Government took its easement in February of 1942, I think it was.

Mr. Blair: Yes. Now, he was to pay 50 cents a thousand plus converting this road, and the amount of money he spent converting the road is part of the money he spent.

The Court: He may answer. Let's proceed, objection overruled and exception.

A. Well, I think we spent some twelve to fifteen thousand dollars upon that road. Much of that was on these bridges, putting decks—the bridges were impassable, and shaky, and we fixed that up so that it lasted our purposes, although we were warned by Polsons it was not safe to use.

Q. Now, didn't you tell Mr. Polson that you spent about twenty thousand dollars on the road?

A. I think not.

Q. You did not?

(Testimony of W. H. Abel.)

A. No, I think not, but if you have got anything in writing I will be glad to admit it, if that be the fact.

Q. No, it was purely an oral conversation, Mr. Abel.

A. No, of course we used it for other purposes, you [172] understand.

Q. Now, you paid 50 cents a thousand, and you spent about \$12,000.00 improving the road, and yet you want this jury to understand that the highest and best use of that logging road is to grow trees on?

A. Yes, for the main reason that there is no more timber to go over it that the Polsons control.

Q. That Polsons control?           A. Yes.

Q. Polsons did not control the A. M. Abel timber?

A. For forty-two long years we were unable to get it out. They moved their railroad out without having a chance to get it out.

Q. You owned it?           A. My brother did.

Q. Polson did not own any of it?

A. No, it was there marooned, and we did not have a balloon.

Q. Mr. Abel, what is in the watershed of the West Fork of the Humptulips to the north of the country through which this logging road is made out?

A. Well, there is the last virgin stand of Government timber that can feed Grays Harbor.



(Testimony of W. H. Abel.)

Q. And it is a beautiful stand of timber, isn't it?

A. Well, there is a lot of good timber.

Q. If you owned—

A. It is publicly owned, with the exception of a little that we have yet, and a little the Polsons have.

Q. Mr. Abel, if you owned the section—the timber in Section 4—that is the Section immediately above Tract 3, to the north of Tract 3 that is under condemnation in this case, if you owned the timber in Section 4, would this railroad—would this logging road have any value to you for other than growing trees?

A. For a couple of months while the timber is being taken off.

Q. You could take the timber off of it in a couple of months?

A. You remember the Polsons don't pay, too.

Q. Well, let's assume that you owned the timber on Section 5, the Section to the west of Section 4. Would this road have any value to you other than for growing trees—Section 5, the section immediately to the west of Section 4,—would this road have any value to you other than for growing trees?

A. Well, I don't own the Section.

Q. Assume that you owned the Section, would it have?

A. Well, that would be a violent assumption. Of course, if Polson owned the National Forest, sure this road [174] would be valuable to them, but they do not own it, as I understand.

(Testimony of W. H. Abel.)

Q. It would be valuable to anybody that owned the National Forest, wouldn't it?

A. If they owned both.

Q. Yes, if they owned both.

A. I did not understand the necessities of the condemning price was the price of what they had to pay over and beyond the market value.

Q. Mr. Abel, if you owned the timber in Section 5, this road would have a value to you, far over and above the value of growing trees on the present road, wouldn't it?

Mr. Keenan: May I interrupt just a moment, who owns Section 5?

Mr. Blair: I haven't any idea.

Mr. Keenan: I think that Section 5, Your Honor, is owned by the United States Government.

Mr. Blair: It may be.

Mr. Keenan: And part of the National Forest, and certainly the necessity of the Government here for an outlet for its timber has no bearing on the market value of the lands taken. The whole purpose of the condemnation statute is to avoid just such a situation. It has become so bad in this state that loggers have a right to condemn the lands of other loggers in order to [175] get access to their timber.

The Court: I do not think you need any extended argument. I shall overrule the objection and let him answer, and based upon the assumption.

(Testimony of W. H. Abel.)

Mr. Blair: You may answer "yes" or "no" to that question.

Mr. Keenan: Exception.

Q. Mr. Abel, if you owned the timber in Section 5, which is the Section immediately west of Section 4, north of the area now traversed by this logging road, would this logging road have any value to you other than for growing trees?

A. If I owned it, yes.

Q. It would have? A. Surely, surely.

Q. Now, you say that in 1942, I believe it was in February of 1942, after having discontinued the use of this part of the road that you had been using under the agreement with Mr. Polson, made in 1939, you went in there under a license from the Government?

A. Yes. You understand, we were enjoined, although we were at war, we were enjoined and couldn't any longer use this road. There was an injunction pending, and then we brought our condemnation suit, and then the Government came and brought their condemnation suit, and ours dropped, [176] so we entered under the Government permit, the permit dated February 2nd, 1942, and the receipt for the \$500.00 paid is dated February 5th, 1942, and they are both in the court room.

Q. You did pay the Government \$500.00 for the right to go on there?

A. Yes, and for the maintenance charge. That was conditioned on our maintaining the road.

(Testimony of W. H. Abel.)

Q. You were required to maintain the road, by the Government?      A. So we can use it.

Q. So you could use it?

A. Yes, and be responsible if anything happened.

Q. Did you maintain the road?      A. We did.

Q. Did you do any work on the road other than maintenance work after you went in there in 1942?      A. On the bridges.

Q. None on the road?      A. Yes.

Q. I mean other than ordinary maintenance work?

A. Graded it every week, filled up the chuck holes, and saw that the deck of the bridges was in condition to use.

Q. Now, as I understand it, so far as the road itself was [177] concerned, after you went in in 1942 and carried on the ordinary and usual maintenance work on that logging road——

A. Oh, I think we did more than that, because of the complaint of Polson Logging Company that the bridges were unsafe, so the Government just made us get in and fix up the bridges.

Q. So, you did some more work on the bridges there in 1942?      A. Yes, sir.

Q. How much did you spend on that?

A. Oh, I don't know. I wasn't there, and——

Q. Well, did you spend as much as a thousand dollars on it?      A. More.

Q. How much more, Mr. Abel?

A. Oh, probably fifteen hundred,—maybe more.

(Testimony of W. H. Abel.)

Q. May fifteen hundred dollars?

A. Yes, and that was all under our Government permit, under which we were to keep it so it was safe to use.

Q. The Government required you to do that?

A. Yes, sir.

Q. And also required you to pay \$500.00?

A. Yes.

Q. For the privilege of going in and using that road?

A. Well, as I understand it, that was the maintenance charge. That was a deposit for maintenance purposes. [178]

Q. Did you ever get that \$500.00 back?

A. No, not that five hundred. I think we got back the second year's deposit, which was \$300.00 for the second year, until October—whatever the date was when we stopped.

Q. But, the \$500.00 the Government retained?

A. The Government retained, but we were refunded the three hundred.

Q. The three hundred?           A. Uh-huh.

Q. Now, you were talking this morning about a railroad that you sold, in the Township, as I understand it, to the east of the Township where the road is under condemnation?

A. No, I didn't say that I sold it. It was not sold at all. The rail was taken up and the grade is still there.

Q. And that road belongs to who?

A. Donovan Corporation.

(Testimony of W. H. Abel.)

Q. Donovan Corporation? A. Yes, sir.

Q. And the fact of the matter was, that Polson had the timber to the west of Donovan Corporation?

A. Yes, sir.

Q. Schafer had the timber to the east? [179]

A. No, Simpson.

Q. Simpson had the timber to the east?

A. Yes.

Q. Simpson also had the timber to the north?

A. No, Simpson had it checker-boarded in the upper Winoochie in 22, 8 and the timber due north, and much of the other timber was owned by the Forest Service. There was just three owners.

Q. And Simpson?

A. As in this situation.

Q. Simpson Logging Company took the Government owned timber out over the Winoochie Bridge to the north, didn't they?

A. No, much of that timber is still there—practically all of the timber in 22—in 22, 8. I don't believe 22, 8, has been logged at all. It is principally Forest Service timber, and it all depends on the future policy of the Government as to when it comes out.

Q. But, it will undoubtedly go out through Simpson to the north? A. Well, Simpson is east.

Q. Well, east or north?

A. Either there or over the Polson road, unless others are permitted by use of this road to cross the east fork—the ridge—the east Humptulips ridge



(Testimony of W. H. Abel.)

—and invade that [180] territory so it comes to Grays Harbor.

Q. So you think the road under condemnation here may reach over to the East Forks of the Hump-tulips, as well as taking the timber in the West Forks basin?

A. Well, the ridge between it, certainly.

Q. So they may use this road to take out more than the billion, four hundred million?

Mr. Keenan: That is objected to, the use to which the United States—

The Court: I think I shall sustain the objection. I ruled on that matter yesterday.

Q. Now, Mr. Abel, you said that you were litigating with the Polson Logging Company at the time that they had gotten an injunction to restrain you from using this road?      A. Yes.

Q. And you were litigating with them at the time the Government started this condemnation proceeding?      A. Yes, sir.

Q. And since that time there has been further litigation brought against you by Polson?

A. He sued us for \$28,000.00 for using it under our Government permit.

Q. And you have a very direct interest in the outcome of this litigation? [181]

A. I certainly have.

Q. You certainly have?

A. I certainly have.

Q. As a matter of fact, you had a lot to do with the instigation of this litigation?

(Testimony of W. H. Abel.)

A. I had something to do with it and I would be glad to tell you what it was.

Q. As a matter of fact, you expect to buy timber here in the National Forest and take it out over this very road, Mr. Abel?

A. I hope we have the right in common with every citizen. I hope that everybody can't be shut off. I hope that nobody will be shut off.

Q. But, when you buy that timber, Mr. Abel, you will pay a dollar and a half or two dollars a thousand more if you have the free use of this road than you would pay if you didn't have the free use of this road?

A. Well, I will never pay it to Polson Logging Company. I simply won't pay tribute.

Q. You won't pay tribute?

A. I will not pay tribute to get Government—

Q. Yet you say the highest and best use of that logging road is to grow trees?      A. Yes.

Mr. Blair: That is all. [182]

### Redirect Examination

By Mr. Keenan:

Q. Mr. Abel, what was the occasion of this injunction suit brought by the Polson Logging Company against you?

Mr. Blair: We object to that as immaterial.

The Court: Objection will be overruled.

Mr. Blair: The question goes to his interest as a witness.

The Court: That is true. For that reason I am overruling the objection. We do not intend to try

(Testimony of W. H. Abel.)

that case, but in so far as it may throw any light on the interest of this witness in the outcome of the case, it is competent.

A. The Government was in need of timber. This country was at war. We were——

Mr. Blair: Now, if Your Honor please——

The Court: Yes, I will sustain the objection to the statement made. The jury are instructed to disregard it.

Mr. Metzger: I ask the witness be instructed to confine his answers to the question.

The Court: The witness is an eminent member of the bar of this state.

Mr. Metzger: I realize that, and I realize also his habits. [188]

Q. Mr. Abel, what was the immediate cause of the injunction suit—what were you being enjoined from doing?

A. From taking timber from the National Forest.

Q. Over this road?           A. Over this road.

Q. Had you previously had a contract with the Polson Logging Company?

Mr. Blair: We object, if the Court please, as immaterial to any issue in this case.

The Court: The objection will be overruled. The question is not finished, but I assume——

Mr. Blair: Well, the answer was already started, was the reason I made the objection.

The Court: Your objection is well taken in that regard. Finish your question.

(Testimony of W. H. Abel.)

(Question read.)

Q. (Continuing): Which permitted you to use this road?

A. Yes, as to the A. M. Abel half section.

Q. Had you previously had a contract with the Polson Logging Company which permitted you to haul logs out?      A. Under an assignment, yes.

Q. From the Forest Service?

A. No, then we were enjoined from taking the Forest Service timber out, whereupon we brought an injunction suit, and then later we brought our condemnation suit, [184] and then the Government came in, in February of 1942, with its condemnation suit, and we couldn't go on with ours, so we dropped it, and then on April 8th we made another settlement with Polson and bought the timber on the southeast quarter of 3, and the suit for damages for taking out the timber they sold us, among other things. There was no other way to take it out, We had three years to take it out.

Mr. Metzger: Your Honor please, I move to strike the last part of the witness' answer as irresponsible, volunteered, and subject to objection I made before. The witness is continuing volunteering and not answering questions.

The Court: I think the answer may stand. I will allow you an exception. Motion to strike denied.

Q. How much did you spend—strike that.

I believe you mentioned spending \$15,000.00 on

(Testimony of W. H. Abel.)

this road before the Government stepped in the picture?

Mr. Blair: \$12,000.00 I believe is the testimony.

Mr. Keenan: Twelve to fifteen.

Mr. Blair: All right.

Q. Did the Polson Logging Company spend any money at all [185] on this road that you know of, at any time since you first started to haul logs over it in 1939?

A. I am certain that it did not.

Mr. Keenan: I think that is all.

Mr. Blair: That is all.

(Witness excused.) [186]

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PAUL H. LOGAN,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Logan?

A. Paul H. Logan.

Q. Where do you reside?

A. In Portland.

Q. How old are you? A. Forty-six.

Q. And what do you do for a living?

A. I work for the United States Forest Service.

Q. In the Regional Office?

(Testimony of Paul H. Logan.)

A. In the Regional Office, at Portland.

Q. Have you had any academic training in forestry?

A. Yes, I studied forestry at Cornell University, and received a degree in that science in 1926.

Q. And how long have you worked for the Forest Service?

A. I went to work for the Forest Service in 1927, in the spring.

Q. And what was your first assignment—first, where were you and what were your duties?

A. In 1927 I was assigned to the Olympic National Forest, [187] whose headquarters were in Olympia. I was stationed at one of the camps of the Polson Logging Company and assigned the responsibility of scaling logs of Government timber which was being cut by Polson Logging Company.

Q. And how long were you on that assignment?

A. Approximately two years.

Q. And then what did you do?

A. I moved to other timber sales on the Olympic National Forest, doing similar work, scaling logs and general administration of the particular sales of which I was assigned at the time.

Q. And how long were you—

A. That continued until early in 1930 when I was given the assignment of making what is known as the resource survey of the entire Olympic National Forest, the objective of that job was to determine the quantity and distribution of species, the



(Testimony of Paul H. Logan.)

location of the volume of timber, both in Government ownership and private ownership.

Q. Now, on that assignment—how long did that assignment last?

A. That job continued through 1930, '31 and '32, and a portion of '33.

Q. What was your next assignment? [188]

A. My next assignment was the general administration of timber sales and of acquisition of purchases of land by the Government on the Olympic National Forest, working out of the Olympia office.

Q. What date does that take us up to?

A. That takes us up to early in 1937. Then, I transferred from—was transferred from the Olympic National Forest to the Snoqualmie National Forest, with headquarters in Seattle, and was placed in charge of all the timber sales on the forest, and all of the land acquisition work, as well as the responsibility for fire control. That job lasted until the spring of 1939, when I was again transferred to the—I was transferred again this time to the Regional Office in Portland, and assigned to the job of preparing for the settlement of the lawsuit between the Northern Pacific Railway Company and the Government, a suit in equity to determine the value of their land grant holdings, which had not yet been patented to the railroad.

Q. Was there any land in this area involved in that case?      A. Yes.

Q. General area?

A. Yes, some of the lands involved in the North-

(Testimony of Paul H. Logan.)

ern Pacific lawsuit were located in the general vicinity of the property that has been taken. [189]

Q. Where were they with respect to this property?

A. They were to the north of this property in general, embracing most of the odd numbered sections, 1, 3, 5, 7, and so forth, in practically all the West Humptulips drainage within the boundary of the forest.

Q. By the way, something was said about checker-boarding, by the previous witness. What is meant by "checker-boarding"?

A. The usual inference is, that one party or agency will own sections 1, 3, 5, 7, 9, and within a township, and another party or agency or holder will own sections 2, 4, 6, 8, 10 and so forth. The word "checker-boarding", is descriptive. It shows the ownership pattern in black and white. Johnson owns 1 and 3 and Tom Smith owns 2 and 4.

Q. How long were you on this Northern Pacific case assignment?

A. That job lasted from the early spring in '39 until the latter part of 1940.

Q. And then what did you do?

A. Why, I was then assigned the job of assisting with the general timber sale—timber management work throughout the entire region. That entailed appraising National Forest timber for sale. That also included appraising privately owned lands and timber lands, some cut over, [190] which the Government was in the process of acquiring through

(Testimony of Paul H. Logan.)

purchase, through exchange procedure, which is virtually purchase. It also included checking on the men who were responsible for the administration of those sales, most especially the scalers, to see that their scaling technique was proper and correct, and that justice was being done to the Government, as well as to the operators, and some training in connection with the scaling and grading work.

Q. Now, in connection—that is your present assignment, is it not?

A. Well, I finally got back to that, but there is some intervening.

Q. Have you—the Forest Service, ever acquired cut over lands from time to time?

A. Yes, the Forest Service had acquired a lot of cut over lands.

Q. Have you had anything to do with the acquisition of those cut over lands?

A. Yes, I have. The lands which in those cases with which I had some direct connection or responsibility, total about 19,000 acres.

Q. During the time you were working on the Northern Pacific case, was it necessary for you to make any investigations of the sales of cut over lands? [191]

A. That was one of the things that we had to do. The primary purpose of that—the objective of the suit, was to determine the equitable, or the fair cash market value of the three hundred and twenty odd thousand acres that were involved in the litigation,

(Testimony of Paul H. Logan.)

and in doing that I checked all the records available on sales, on all types of forest lands.

Q. Actually, there were no cut over lands in dispute?

A. Well, very slight—very minute, almost infinitesimal part of that 320,000 acres had cut over.

Q. Have any burned over lands?

A. Lots of burned over lands, yes.

Q. Now, are you familiar with the property involved in this case?      A. I am.

Q. Have you examined that property?

A. I have.

Q. When did you examine it?

A. Why, I first was on the property in—on part of the property in 1927. From 1927 to 1937 I was over it a number of times, but I don't recall the exact dates.

In connection with my work in the Northern Pacific lawsuit, I had occasion to look at some of the lands again. That is also true at the time I was working on the research survey from 1930 to subsequent [192] years, and in connection with this case I was first on this—over the road and over most of the property in early March of 1942. After that, I have been over the road at least four times, early this fall.

Q. What condition was this roadway in when you first examined it in 1942, I believe you said?

A. Well, the road was—had been at that time converted from a railroad grade to a truck road. It was passable by car, fairly well closed in with reproduc-

(Testimony of Paul H. Logan.)

tion on the side, very narrow passageway. Sufficient room for one automobile to pass, or one truck.

The bridges were enough to make one's hair stand on end, almost, as you drove across. There were no guard rails or such things, but they did hold up the car that I was using.

Q. What was the character of the ground cover on the lands adjacent to the road?

A. Well, all of the lands have been cut over—had at that time been cut over, and from my own knowledge and from checking of the records in the County offices, that cutting I found extended from about 1918 to about 1939.

Subsequent to the logging operations there had been some fires. I did not have the date of the fires, but some had occurred after the logging and certain had covered later years after the logging. [193]

The lands on the right of way adjacent to the road are fairly well stocked with reproduction of varying ages from a few years—two or three years to as much as eighteen to twenty years.

Away from the immediate grade, the reproduction we would say was spotty, in some places fair—some places none, some places good.

Reproduction consists primarily of hemlock, Douglas fir, a little bit of cedar, some white fir, some white pine, which, by the way, has been almost entirely—the trees diseased, and some Sitka spruce, which is suffering from damage caused by bud worm. In those places which are not well stocked with useful reproduction, there is a considerable cover of

(Testimony of Paul H. Logan.)

bracken fern, willows, some cranberry marsh, grasses, and a little bit of alder—considerable alder in places along the railroad grade. None of the timber—none of the trees that are along the road is of merchantable size. There is no merchantable timber.

The lands away from the highway, I say the reproduction is fairly well spotted, but it has been logged at one time or other, about 1918.

Q. How do you account for the fact that the timber is spotted away from the road, rather than on the road, or immediately adjacent to it? [194]

A. Well, construction of a railroad grade, the top layers of vegetable—decomposed vegetable matter known as the duff is torn away, upset and moved, and it exposes mineral soil, which is conducive to regeneration,—to the start of new trees. Frequently, while logging operations are still going over a logging road, one sees small trees coming through the mineral soil, whereas just beyond the grade over in the logged area where the mineral soil has not been generally disturbed, there would be absolutely no reproduction. You will find little trees growing along the railroad grade. That condition has continued, so the reproduction of the young trees along the immediate road where the soil—the mineral soil has been exposed, are pretty well established in places, and beyond them the reproduction is not as far advanced, or is not yet established.

Q. Have you checked on the dates of cut on the various sections in this township?

A. Yes, I checked that at the office of the County



(Testimony of Paul H. Logan.)

Assessor, to whom owners of timber lands make annual reports on their cut.

Q. Can you tell us on what dates those various sections were cut over?

A. I have a map, Mr. Keenan, which I—— [195]

Q. Is this the map?

A. That is the map which is a replica of the map found in the County office.

The Court: I think you should show that to the counsel for the respondent, and maybe you can agree upon it.

Can you agree upon the admissibility, Mr. Metzger? Do you agree upon it?

Mr. Metzger: We do not think there is much materiality to it, Your Honor.

The Court: But, aside from that, do you agree upon its admissibility?

Mr. Metzger: I don't think we will object.

Mr. Keenan: What is the number on there?

The Clerk: 18.

Q. You now have in your hand Petitioner's Exhibit No. 18 for identification. Will you tell us briefly what that is, and who made it?

A. That is a reproduction of a map found in the County Assessor's office, which shows the years in which the lands and the portion of Township 21-9 and 21-10 were logged.

Q. And did you check——

A. I took the original from the County records and had the map prepared by one of our draftsmen.

(Testimony of Paul H. Logan.)

Q. Did you also check the statements filed by the various land owners with the County?

A. No, sir, the County takes those statements each year, and from the sketches which accompany those statements, they indicate on a key map which sections that particular owner claims to have logged that year.

Q. Is that an exact copy?

A. This is an exact copy, except that the scale has been stepped up from a two inch to a mile to a four inch to the mile, and is placed on a base—on the same base as the exhibits on the easel.

Mr. Keenan: At this time, the petitioner offers in evidence Petitioner's Exhibit No. 18 for identification.

The Court: It will be admitted in evidence.

(Whereupon, map referred to was then received in evidence and marked Petitioner's Exhibit No. 18.)

Q. Now, have you made any—are you generally familiar with the values of cut over lands in Grays Harbor County?      A. I am.

Q. Have you made any preparation to testify to value in this case?      A. Yes, I have. [197]

Q. What have you done by the way of preparation?

A. Why, I have, in the first place I have looked on the property and compared this property with similar properties with which I have been familiar previously. I formed my opinion as to value from that comparison. I further checked at the office of

(Testimony of Paul H. Logan.)

the Treasurer of the County on recent sales to individuals in this immediate vicinity. I talked with some people who had purchased lands in this vicinity recently, alluding primarily to Mr. Abel.

Q. Have you formed an opinion as to the fair cash market value of the land taken in this case in the form that it was when the Government took it, but basing your valuation or your fair cash market value as of the date March 22, 1943?

Mr. Metzger: I object, if Your Honor please, as wholly improper. State the valuation and the condition of the property as of date October 22, 1943.

The Court: I do not want counsel to be misled or misunderstand the Court's ruling in the pre-trial hearing, giving the respondent the option to select a date when the Government first went into possession of this property or the date when they filed their declaration of taking in fee.

Mr. Metzger: If Your Honor please, there [198] wasn't any option about it. That was a contest as to which date was the date, and Your Honor decided it was October 22nd, the order so states.

The Court: The Court's recollection of my own statements and the record would bear me out. If it does not, I definitely rule now the market value when the Government first went in under its original taking under an easement, then they were when they went in under their fee simple taking, and all improvements made in the interim between the first taking and the last taking must be excluded in es-

(Testimony of Paul H. Logan.)

timating the value—that is, improvements made by other than the respondent.

Mr. Metzger: Your Honor, I except to Your Honor's remark, because the order is, I believe, is in writing and we have a right to—

The Court: The Court has just examined its order here again, and notes that on its own motion it vacated a previous order that it had made on the ground and theory that it was in error when it made the previous order, which would have vacated entirely the actions of the Government in the first proceeding here. Proceed.

Mr. Keenan: That calls for just a "yes" or "no" answer.

A. Yes, sir, October 22, 1943, is the correct date.

Mr. Keenan: I beg your pardon, it should be [199] October 22, 1943.

Q. Have you formed an opinion as to the value of this property on October 22, 1943?

A. Yes, I did.

Q. What in your opinion was the fair cash market value of the property which is condemned in this case, on October the 22nd, 1943?

Mr. Metzger: Object, if Your Honor please. This witness has not shown himself qualified. He has qualified himself by his own showing, by testimony or statements of Mr. Abel who has already been a witness here. His testimony is hearsay.

The Court: I know, Mr. Metzger. He went farther than that, and stated he examined much land for the Government in years preceding, and the ob-

(Testimony of Paul H. Logan.)

jection will be overruled, but I am going to, before this witness answers, and I think I overlooked it in the other—these witnesses, because it is a material issue in every case of this nature, and certainly in this case, should base their estimate upon what they consider to be the highest and best use of the land involved, and of course that question has not been asked.

Mr. Keenan: That is an omission on my part with this witness. [200]

Q. What in your opinion is the highest and—subtract the last question.

What in your opinion is the highest and best use to which this land could be put, speaking as of the time the Government took it?

A. Well, it is my opinion the highest and best use would be for reforestation purposes, the growing of timber and for the protection of adjacent lands from fire.

Q. Now, what in your opinion is the fair cash market value of this property—that is, the property condemned in this case on October the 22nd, 1943?

A. It is my opinion that the property was—the fair market price of the property was a dollar per acre.

Q. That is a dollar an acre straight through?

A. Straight through, a total of \$273.93.

Q. Mr. Logan, have you ever testified in valuation cases before?

A. I never have been on the witness stand before.

Mr. Keenan: You may cross-examine.

(Testimony of Paul H. Logan.)

### Cross Examination

By Mr. Metzger:

Q. Mr. Logan, in this Exhibit 18 of yours, you show, as I understand it, a map covering the same area as Exhibit 2, is that correct? It is this map on the [201] board, being Exhibit 2?

A. That is right.

Q. And all of the coloring or cross-hatching on your Exhibit 18, indicates land that had been at one time or another, prior to 1941, logged off?

A. And the year in which it was logged.

Q. Yes. A. That is correct.

Q. Was that all logged from these roads that are shown on Exhibit 2, or from the logging railroads that preceded those truck roads?

A. I would have to make an assumption to answer that question, Mr. Metzger. I did not observe how it was. If you would like for me to assume——

Q. What is your opinion?

A. My opinion is that they were removed by the railroad for the most part, except that in the upper portion, which area I can point out to you——

Q. But, it was all moved either off of the railroad on these locations, or off truck roads on these locations and spurs therefrom?

A. I think that is correct.

Q. About how many thousand acres were so logged?

A. Well, that is a little hard to answer right off. It is virtually a township there, 13,000 acres. [202]



(Testimony of Paul H. Logan.)

Q. Well, a township is, roughly speaking, something in excess of 20,000 acres, isn't it?

A. That is right, 22,000.

Q. So you would say that there was about 23,000 acres tributary for logging purposes, to these roads outside the National Forest, with the exception of maybe 160 acres?

A. That is not quite right, because quite a lot of that in the southeast of that particular township—

Q. How much would you subtract, then? Would you say as much as 20,000 acres outside of the National Forest that was tributary for logging purposes?

A. Oh, approximately.

Q. Well, how much north in the National Forest for logging purposes is accessible or tributable to come out over these roads?

A. Owned by the same party?

Q. No, how much timber?

Mr. Keenan: That is objected to.

The Court: I think that I will sustain the objection. You mean how much Government timber?

Mr. Metzger: I don't care; how much timber?

The Court: I will sustain the objection unless you qualify your question to cover privately held timber. I thought I made it clear yesterday on [203] this issue. I don't mean to keep you from making your offer of proof. The position of the Court is, and the jury will be charged in due time, that no estimate can be made on the hauling of the National Forest products over this or any other road within the next year or ten years or any other time.

(Testimony of Paul H. Logan.)

Mr. Metzger: Well, Your Honor, we eventually may.

The Court: If you want to protect the record by an offer of proof either in the presence or absence of the jury,—

Mr. Metzger: We will do that at the proper time.

Q. How much private holdings are there in the National Forest, in the Olympic National Forest, in this particular Humptulips basin?

Mr. Keenan: That is objected to, Your Honor, unless the private holdings are the private holdings of the Polson Logging Company.

The Court: Oh, I think I shall let him answer the question to determine the situation. You are limiting it to this particular watershed, I assume?

Mr. Metzger: Yes.

Mr. Keenan: It is also objected to, Your Honor, on the further ground that it must be land which [204] is abutting or adjacent to the present existing grade, which is in dispute here.

The Court: Well, probably the Court has taken for granted this is the only way that they can come out—the only watershed and only grade they have to come out. I don't know. I think you will have to qualify your question a little more, Mr. Metzger.

Q. Well, Mr. Logan, how much privately owned timber is within the boundaries of the Olympic National Forest and within the watershed or basin of the West Fork of the Humptulips River, that comes out over this road, in your opinion?

Mr. Keenan: That is objected to, Your Honor.

(Testimony of Paul H. Logan.)

It would make no difference whether the timber to come out over this road was Government owned timber or privately owned timber.

The Court: Objection will be overruled and exception allowed.

The Witness: May I have—

Mr. Keenan: My understanding, Your Honor, that it is not—it will not be necessary in this proceeding for either one of us to take an exception to any ruling?

The Court: That is right, an adverse ruling, the record may show you may have an exception without [205] so claiming.

A. I have not made a recent check on the total volume of timber in private ownership in the drainage of the West Fork of the Humptulips, within the boundaries of the forest. I have made a check on lands owned by the Polson Logging Company within that drainage.

Q. You made a survey, you said, on direct examination, of the privately owned timber and the Government owned timber in that area?

A. That survey, sir, was conducted from 1930 to 1935, since which time many changes have taken place.

Q. You mean that timber in that particular area has been to any considerable extent logged off?

A. Some of it has, sir.

Q. Where?

A. Well, southeast of Sections 3, 4, 1.

Q. Southeast of Sections 3 and that—how did

(Testimony of Paul H. Logan.)

that timber—was that timber removed, if you know? It was removed by truck over this road as shown on this map, was it not?

A. I believe that is right.

Q. All right, what other timber in the National Forest that is gone since you made your survey?

A. Some from Section 2, also, a sale of National Forest timber. [206]

Q. Some from Section 2, and that also was taken out over this truck road? A. I believe so.

Q. That is right. Anything else?

A. I think some was moved from Section 6.

Q. Some in Section 6? A. I believe so.

Q. That also came out over the other branch of this truck road, did it not? A. Uh-huh.

The Court: You will have to answer.

A. Yes, excuse me.

The Court: The Reporter does not get the nod of your head.

Q. The Forest Service made a sale this summer, the timber on which is now being moved out over this truck road?

A. I think it has not yet started to move there, yes, sir.

Q. Well, it has already, isn't that a fact?

A. I don't think it has started to move yet. It had not the last time I checked.

Q. But when the sale was made it was contemplated? A. It will move shortly, yes, sir.

Q. And all of the sales that the Government

(Testimony of Paul H. Logan.)

contemplates of timber in that area will come out over this road?

Mr. Keenan: That is objected to, if the Court please.

The Court: I shall sustain the objection to the question. I shall have to sustain the objection.

Mr. Metzger: Well, we offer to prove by this witness that his answer to that question would be in the affirmative.

The Court: I am assuming that the petitioner objects to your offer of proof.

Mr. Keenan: I object to the offer of proof. I think it is irrelevant and immaterial.

Mr. Metzger: Allow us an exception.

The Court: Mr. Metzger, will you take some little time yet this witness?

Mr. Metzger: We will. It will be a little bit of time, your Honor.

The Court: It is a little after the hour and I thought we might take the afternoon intermission, unless you would be through with another question or two. Then there may be some redirect, so we will take the afternoon intermission now, gentlemen of the jury, for fifteen minutes.

(Recess.)

Q. Mr. Logan, I understood you to say that the Government [208] had recently made a sale of timber. I believe it is in Section 2, 21, 9, which was to come out over this road, but you did not know whether it was yet being moved out or not, is that correct?      A. That is not quite correct.

(Testimony of Paul H. Logan.)

Q. Well, will you correct me?

A. The Section of the timber that I said I thought had not been moved, was not located in Section 2. The timber in Section 2 is sold, and operated some time ago. It was complete.

Q. That is complete? A. Yes.

Q. Was there not a sale advertised in September of this year for timber in Section 2, 21, North 9 West, and Sections 34 and 35, 22, North 9 West?

A. I believe that is correct, sir.

Q. Isn't that the sale that you are referring to?

A. No, the one that I alluded to, that sale was advertised and made to Ed Picko. The sale to which I first alluded was made to Don McKay.

Q. Well, this sale to Picko, whatever the name is, the timber will come out over these roads?

A. I presume that it will.

Q. Is coming out now?

A. Has not yet started to move, sir. [209]

Q. I see. How much is involved in that sale?

A. I don't recall.

Mr. Keenan: If the Court please, I object.

The Court: I shall sustain the objection. The needs of the Government in the acquisition cannot be effected by placing the value of it, or the use to which they are going to put the land they are taking—are not a matter to be taken into consideration in fixing the highest and best use of this road, or this land when held by the respondent.

Mr. Metzger: You Honor, with all due deference, I believe the law is unbrokenly—



(Testimony of Paul H. Logan.)

The Court: I do not care for an argument.

Mr. Metzger: I realize. I would like an opportunity some time to discuss that question and present that argument to the Court.

Q. And the Government is contemplating another sale in that immediate vicinity?

The Court: I sustained the objection.

Mr. Keenan: That is objected to for the same reason, your Honor.

Mr. Metzger: Well, if your Honor please, we offer to prove that the witness, if permitted to answer, would answer that question in the affirmative.

The Court: Well, the Court is taking the [210] position that what the Government intends to do with this road, and when and how and where and to whom it will sell the timber, that might move over this road or otherwise, is not a matter material in fixing the value of this road.

Q. Mr. Logan, in advertising this sale in Section 2, 21, North Range 9 West, and 34 and 35, Township 22 North, Range 9 West, the advertisement was published, was it not?      A. Yes.

Mr. Keenan: That is objected to. I conceive that irrelevant and immaterial as far as applied to any issue in this case is concerned.

The Court: He has answered in the affirmative. I don't know what the purpose of this question is.

Q. And in advertising that sale, it was stated that this road would be available for the removal of the timber?

(Testimony of Paul H. Logan.) -

Mr. Keenan: That is objected to, your Honor.

The Court: Sustain the objection.

Mr. Metzger: Exception, and again we offer to prove that it is a matter of public advertisement that the Government and all persons generally in considering market value are advised by the Government that the propose to use this road as a means of removing this timber. [211]

The Court: Yes, but Mr. Metzger, if you assume that to be a fact, it probably is a fact, but that still does not become a factor in fixing the value the Government must pay for the road, or the land.

Mr. Metzger: Any purchaser or seller would take that into consideration in arriving at what they would pay.

The Court: That may or may not be the objective the Government had in acquiring this right of way.

Mr. Metzger: They stated so in this petition this declaration of taking.

The Court: It is not material to the jury in placing the value they are going to place upon it.

Mr. Metzger: Allow me an exception.

The Court: Yes.

Q. Mr. Logan, as I understand you to say, that when you first came on this land, as far as any connection with this case is concerned, in March of 1942—

A. That is right.

Q. And the roads were then—had been previously and were then in operation as previously con-

(Testimony of Paul H. Logan.)

verted, and were then in operation as logging truck roads?      A. That is right.

Q. That is right. Do you know of any improvements that [212] have been made to those roads since that time, other than the rebuilding of the Stevens Creek Bridge and the replacement of the O'Brien Creek Bridge with a fill?

A. I don't know.

Q. Well, you don't know whether any have been done or you don't know anything about it?

A. I don't know that any have been done.

Q. You don't know that any have been done. You say, then, that with the exception of the replacement of the Stevens Creek Bridge with a new bridge, and the replacement of the O'Brien Creek Bridge with a fill, no improvements have been made to this road since then, in that time?

A. I wouldn't say that, Mr. Metzger, no, sir.

Q. Is that not the fact?      A. I don't know.

Q. So far as you know, it is a fact?

A. I don't know.

Q. Well, I mean you were on it—you said you had been on it several times for the purposes of this case. So far as your observation has gone, that is the fact?

A. Somebody has improved the road considerably between the time I was first on it and the last time.

Q. In other respects than these two? [213]

A. Yes, sir.

Q. Where and how?

(Testimony of Paul H. Logan.)

A. Why, there is evidence that it has been graded, and evidence that there has been additional clearing. There is evidence that the bridges not replaced have been worked upon.

Q. When was the last time you were on it?

A. In September of this year.

Q. What date in September?

A. I would have to check my diary to tell you specifically. I think it was the 11th, was the last time I was on it.

Q. The 11th. Now, Mr. Logan, probably one last question. Do I understand you that in your opinion the highest and best use of this—what you have testified was, in March of '42, a usable truck road, and was in September of 1945 a usable truck road—that the highest and best use of it is for growing trees, is that right?

A. That is right.

Q. That is your opinion?

A. That is right.

Q. You want the jury to believe that that is the best opinion you have got on the subject?

A. That is right.

Q. And that applies also, does it, to tracts 2 and 3, that the highest and best use of that ninety acres is for [214] growing trees?      A. I do.

Mr. Metzger: That is all.

### Redirect Examination

By Mr. Keenan:

Q. Mr. Logan, you say the highest—

Mr. Metzger: Just a minute. Well, what con-

(Testimony of Paul H. Logan.)

nection do those—the only connection with these tracts is then that with the rest of the road, you are going to grow trees on them, is that it?

The Witness: The chances are that from a portion of those tracts 2 and 3 some gravel would be removed to keep the road up. However, the gravel on tracts 2 and 3 is no different than the gravel on lots of other lands immediately adjacent. In tracts 2 and 3 there is enough gravel to keep up several miles of road, more than is involved in this.

Mr. Metzger: Where is there any gravel on tract 2?

The Witness: On tract 2, sir?

Mr. Metzger: Where on tract 2? You have got ten acres there now. Tell me where?

The Witness: Well, I suspect you could find gravel almost any place on those ten acres. [215]

Mr. Metzger: That is your suspicion?

The Witness: Our engineers—

Mr. Metzger: I did not ask what your engineers—I am asking you for your testimony and what you know. Where is there any gravel on tract 3?

The Witness: Well, there is some right along the road, you can see it, sir.

Mr. Metzger: What part of the road?

The Witness: Well, from most of the road through tract 3.

Mr. Metzger: Oh, there is a road through tract 3?

The Witness: Yes, sir.

(Testimony of Paul H. Logan.)

Mr. Metzger: Improved road through tract 3?

The Witness: The road is through, yes. It is usable and passable.

Mr. Metzger: Pretty fair road?

The Witness: That is a pretty fair road.

Mr. Metzger: And it goes through tract 2 as well?

The Witness: That is right.

Mr. Metzger: So far as you know, though, you still insist that the use of those two tracts is to be for the growing of trees?

The Witness: Yes, sir. [216]

Mr. Metzger: That is all.

By Mr. Keenan: (Resumed):

Q. Mr. Logan, when you are referring to the highest and best use of this land, do you consider the highest and best use to the Government, or do you exclude that? A. I excluded that.

Mr. Keenan: That is all.

#### Recross Examination

By Mr. Metzger:

Q. The highest and best use by the Government is the use for which this land is available, is it not?

Mr. Keenan: That is objected to, your Honor. It is obvious here that the Government is going to put the highest and best use, but that highest and best use does not relate to the Government use.

Mr. Metzger: If that is the highest and best use, that is the rule, whoever it is.

The Court: I don't think that is the rule of law.



(Testimony of Paul H. Logan.)

The use they put it to is not necessarily the fact, whatever they may see fit to use it for under their sovereign right to take it cannot be made the determining factor in what actually was the highest and best use at the time they did take it. [217]

Mr. Metzger: It is not a question of what then was the highest and best use. The question is, what is the highest and best use to which it may reasonably be put in the reasonably be put in the reasonable future by anybody, Government or anybody else.

The Court: Well, the law might be subject to some qualification there. I think I shall sustain the objection.

Mr. Keenan: That is all.

(Witness excused.) [218]

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NORMAN PORTEOUS,

produced as a witness on behalf of the Petitioner, after first being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Your full name is Norman Porteous, is it?

A. Yes.

Q. You reside in Seattle, do you, Mr. Porteous?

A. Yes, sir.

Q. How old are you?                   A. 54.

(Testimony of Norman Porteous.)

Q. And what is your occupation?

A. Forest Engineer.

Q. And you have offices in Seattle?

A. I do.

Q. What are the duties of a Forest Engineer?

A. They cover——

Q. I mean practicing, such as you do?

A. Well, cruising the timber, locating logging roads, railroads and truck roads, appraising timber and forest management. In some cases, selling and buying and selling of timber.

Q. Now, how long—or can you give us a brief resume of your experience in the timber business, or as a consultant [219] on timber matters, or anything of that kind?

A. I started in 1908 in British Columbia, engineering.

Q. Will you speak up just a little bit?

A. As a chain man, and rod man, and instrument man.

The Court: Speak a little louder.

The Witness: In 1911, I became chief of a survey party, in surveying timber and to 1915.

In 1915 I went to work for Clark and Hetrick, Forest Engineers in Vancouver, and I was with them until the fall of 1917.

'17 to the spring of 1918, I was with the Imperial Munition Board, in northern British Columbia, looking for airplane spruce.

1918 to 1919 I worked with James DeLacy and Company in Chicago and Seattle in cruising, and

(Testimony of Norman Porteous.)

in 1919 I cruised and mapped six thousand acres for the Goodyear Logging Company. In the fall of 1919 I opened an office in Seattle. From then on under my supervision, the principle work we did was—we did engineering work for the Eatonville Lumber Company. Stimpson Mill Company, both at their skip mill chief operation, and North Bend Timber Company, and in 1921, following the slow down, in western Clallam County we looked over—my men looked over, under my supervision, seventy thousand acres to determine what damage had been done from timber being thrown by the wind. This information was used by the county for changing the tax rates on the different forties, as to the amount of damage done.

In the fall of 1921 we cruised and mapped about eight thousand acres of the St. Paul and Tacoma Lumber Company.

In 1922 I appraised the Vancouver Lumber Company's properties in British Columbia for a bond issue, and I set a value on that timber, and the value was close to three million dollars.

In 1922 we cruised about twenty-five thousand acres for the St. Paul and the Tacoma Lumber Company.

In 1923 I appraised the Carlisle Lumber Company property at Unalaska. This was a valuation of about three million dollars of timber.

In 1924, for Governor Kerby of Texas I cruised twenty thousand acres in British Columbia.

In 1925, for the Southern Pacific Company I

(Testimony of Norman Porteous.)

gathered together material, principally for the County records of what was timbered and what was not, and who owned it in California, from Fresno north, all of Oregon, all of Washington, Idaho, and Montana and some in the Rockies, west. [221]

In 1927 the merger of the Hammond and Whitney properties. I cruised the property with my men and our cruise was accepted on both sides as setting the quantities of timber that went into the merger.

In 1928 I cruised—we cruised in Clallam County eighteen thousand acres, and I set a value on it of a million one hundred thousand dollars and it was sold for a million dollars.

In 1929 for the First National Bank of Chicago, I went over the properties of Coeur d'Alene Mill Companies and appraised the timber company and their logging railroads and their saw mill, and appeared in the Federal Court of Chicago and testified to these values. Later in '29 and '30 for the Shoveland-Carpenter-Clark Company, I worked on a comparison of wages paid in the woods in Oregon, and British Columbia.

In the fall of '31 I worked out the data on all of the timber holders—principally timber holders in western Oregon, and in the Cascade range from the Columbia River to south of Eugene, on what was a proposed merger. We worked out the company's cruise to compare with the County cruise to try and find a yardstick on which they could agree.

In 1904 under the N.R.A. for the Pacific North-

(Testimony of Norman Porteous.)

west Loggers Association, I made a survey—or under my direction a survey was made of all logging operations in the fire belt of Oregon and Washington. This fire belt consisted of—the survey consisted of a report on their railroads, of the condition of the railroads, their maximum curvature and their maximum grade, a report on the condition of their logging equipment, and also the companies furnished us information on what timber they owned outright and what they had under contract. This survey was used as the basis for the allocation of production of N.R.A.

In 1935 I was employed by the Northern Pacific Railway to go over certain lands which was in their land grant, and make a check cruise, and a preliminary appraisal.

In 1936 I made a report for Mr. Murray of the West Port Logging Company—of the West Port Logging Company's timber, the logging conditions, and their problems that they were up against in logging.

From '37 to '38 we did—or '37 I did odd work.

'38 I did more work for the Northern Pacific, in connection with land grant cases with its cruising.

In '39 and '40 I was employed by the Northern Pacific to make an appraisal for their lands that was [223] in their land grant, that was in their care with the Federal Government. I had with me A. P. LaDue, former superintendent of the St. Paul and Tacoma. We went over their properties. It was over three hundred thousand acres, and we

(Testimony of Norman Porteous.)

worked out—Mr. LaDue worked out his logging cost. We projected our railroads, and I set a value. This work continued till the fall of 1940. The value of these properties was something over ten million dollars.

In '41, I cruised properties of the Hatten Lumber Company, Milwaukee, Wisconsin. There was two thousand and some acres in British Columbia, Oregon and California. I set a price on that property, and I was then engaged to liquidate these properties under the values I placed on them.

In '42 I went over certain lands in the Olympic National Park, and testified to their value in the Federal Court in Seattle.

In 1943 I took over for the E. K. Wood Company, their timber land in Washington, and looking after five cutting and logging contracts, and I also put a value on their logged-off land and attempted to sell it.

Q. Have you kept any checks or any records in relation to cutting over of lands—the rate of cutting over lands in western Washington, Mr. Porteous?

A. I have.

Q. What sort of a check do you keep, and for what years?

A. I started in 1920—in the spring of 1920. I went to each county seat in western Washington and took off what lands were assessed as timber lands. Then each year following that, from each county in western Washington I took off from the returns made by the land owner whether he was a



(Testimony of Norman Porteous.)

logger or an operator, or just a timber owner, what lands had been logged the year previous. I kept this up until 1932, when I couldn't afford to carry it on any farther, but after that I took the records from the State of Washington Tax Commission, which showed each year, in their annual report that what was assessed as timber lands, so I subtracted that from what was there before. Now, this does not show truly what was logged, because there could have been burned lands, but it does show forest lands from one year to another, and I kept that up until 1939.

Q. Speaking of '39, how much land had been cut over—burned over in Grays Harbor County?

A. The record which I have kept in the twenty-year period from March 1st, 1919, to March 1st, 1939, there was 344,514 acres of logged-off land in Grays Harbor County.

Q. Do you know how many acres there were in Grays Harbor [225] County in 1939 that had standing timber on them?

A. My records show that there was 89,814 acres of privately owned timber lands in Grays Harbor County, as of March 1st, 1939.

Q. Now, have you from time to time had any occasion to check the sales of logged-over lands in western Washington?

A. I have.

Q. And what were those occasions?

A. In the spring of 1943, for the Department of Justice, on land in the Tahola Indian Reservation, which had been taken by the Army for a

(Testimony of Norman Porteous.)

munition dump. There was involved there, a question of cut-over lands, and I went over and endeavored to find out in King, Snohomish, and Skagit and Whatcom counties what lands had been sold as logged-off lands with a year or two of that period.

Q. When you were working on the Northern Pacific—you were employed by the Northern Pacific—you were employed by the railroad, weren't you?      A. Yes.

Q. The other side was the Government?

A. Yes.

Q. In that case, did you have any occasion to check the sales of cut-over lands? [226]

A. No, although there was burned over timber lands and reproduction, I did not check any sales.

Q. Have you from time to time handled cut-over lands?      A. Yes.

Q. And that is for your clients?      A. I do.

Q. Do you handle them now?      A. Yes.

Q. Have you sold any cut-over lands?

A. Yes.

Q. When did you last make a sale of cut-over land?      A. Last Thursday.

Q. How many acres were involved?

A. On that occasion, there was about a thousand acres in all.

Q. Where was the land located?

A. On the South Fork of the Nooksack River in Skagit County.

Q. And what did you do to prepare yourself to

(Testimony of Norman Porteous.)

testify to it, just in this particular case, did you make any inquiries, as to sales of land in the vicinity of the land in question here?

A. Well, I talked to Mr. La Salle and he had taken off sales from—as I understood, from the county records, and I accepted those, and I talked to Mr. Abel about purchases he had made.

Q. And did you examine the property here?

A. I have.

Q. When did you examine it?

A. I was first over these properties in October, 1940. It had nothing to do with this case, but in this case I examined them on September 8th and 9th, 1945.

Q. And what in your opinion is the highest and best use for the property taken here, excluding any need of the United States for the property?

Mr. Metzger: Object as an improper question.

The Court: Objection will be overruled.

A. In my opinion, excluding the Government, the best use of the land was for growing timber.

Q. And have you formed an opinion as to the value of the land taken in this case, as of October 22nd, 1943?      A. I have.

Q. And assuming that the land is in the condition it was in when the Government took it over?

A. I have.

Q. What in your opinion was the fair, cash market value of the land condemned herein, on October 21st, 1943?

Mr. Metzger: Object as the witness is not quali-

(Testimony of Norman Porteous.)

Q. And there are some six bridges?

A. Yes.

Q. Did you hear the testimony of the architect put on by the Government, as to the three bridges on Donkey Creek, and the bridge—the Dry Ravine bridge, and the west forks of the Humptulips—that they had five or six years of remaining life in them?

A. I understood that, yes.

Q. But, because of the condition of the bridges you absolutely ignored the fact that this particular land was improved with a logging road?

A. Well, may I answer that in my way?

Q. Yes.

A. Well, the reason I did that was because there was no timber, but, broadly speaking, no timbers to come out over it except the National Forest timber. There wasn't five years of logging in there.

Q. How much timber is there, other than United States Forest Service that might come out over the road, [231] Mr. Porteous?

A. There is a half section of Milwaukee timber. I think it is close to 400 acres lying on the ridge between the two, almost straight east. I believe it is in section twelve. Then within the National Forest, as I—the information which I was able to gather, there is almost a section of which four hundred and some acres is owned by the Polson Logging Company, and 160 acres by Mr. Abel.

Q. That is all the privately owned timber there is?

(Testimony of Norman Porteous.)

A. From the only information that I have been able to find.

Q. Or was, in October of 1943, in that part of the Olympic National Forest which is in the basin of the West Fork of the Humptulips River?

A. That is as far as——

Q. Did you make any investigation to ascertain the facts, Mr. Porteous?

A. I did, in the assessor's office in Montesano.

Q. But, you gave no value whatsoever to this logging railroad because of that substantial section of timber, the Polson Company owns?

A. I have been through that section of timber in 1940, and it was largely a stand of hemlock timber, and from the evidence on the ground, the Polson Logging Company had decided when they pulled out of there, they had [232] taken all of the timber off they could log at a profit, and this other timber—minor species, would not be logged.

Q. How much hemlock would you say that there was?

A. Between hemlock and white fir, seventy-six per cent.

Q. How much timber would you say was on there all together?

A. The only record I have is what I saw in the County.

Q. How much would you say was on it?

A. The county as I remember, showed eleven million feet.

(Testimony of Norman Porteous.)

Q. That is what you had in mind at the time you fixed the fair cash market value?

A. I didn't figure eleven million feet was enough to put in the road and extend beyond the road to reach this timber.

Q. So, it is a fair statement, isn't it, Mr. Porteous, that in arriving at the fair cash market value of the logging road in October 22, 1943, you gave no consideration to any of the timber in the Humptulips Basin lying to the north of the several termini of the road that is under condemnation?

A. Well, the only thing I considered was the land owned by the Polson Logging Company.

Q. And you rejected those as——

A. Yes.

Q. The rest of the land and the timber on those lands, [233] you ignored, and dismissed from consideration?      A. Yes, sir.

Q. What consideration if any did you give to the forest—that is, in the—contiguous to the logging road itself that is under condemnation?

A. You mean, the new growth?

Q. Yes.

A. I did not consider it. I considered that growth would be so long in getting so there is any commercial timber there, that it would be way beyond reason to keep up that road just for that timber.

Q. Now, you had some experience with tree farms?

A. No, I know of them, yes, sir.

Q. It is necessary to have roads in there to pro-



(Testimony of Norman Porteous.)

tect those areas from fire, and to administer those forests?

A. Well some. It is two theories on that. Some have a theory you have no roads, and nobody will go in there. You wouldn't have any berry pickers, and wouldn't have anybody. And others have a theory that roads are well to have to travel on in case there is a fire there.

Q. In other words, I gather from that the ideal situation is to have a privately owned road, where you can exclude the campers and berry pickers and fishermen, yet have a means to protect that young growth from fire if it should start in there, isn't that the [234] ideal set-up? A. Yes.

Q. And in administering a re-growth forest of that type, from 10 to 20 years old, it would be careful and prudent, and is the practice in practical operation to have fire control roads in there, isn't it?

A. Yes.

Q. And wouldn't you say that the road that is under condemnation here is more valuable as a fire control and protection road in that area, than it is for growing trees?

A. The reason I did not consider that was the cost of keeping those bridges up. The timbered growth couldn't stand it.

Q. Well, you wouldn't have to keep the bridges up if you were going to use it for fire control purposes?

A. How would you get across the Humptulips?

(Testimony of Norman Porteous.)

Q. You wouldn't have to keep the great big bridge up to get across the Humptulips would you?

A. I didn't look into that. You would have quite a ways to go down.

Q. You are going to leave the whole forest on the east side of the Humptulips unprotected because you wouldn't put a bridge across the Humptulips?

A. After the blow down in Clallam County, they wouldn't [235] let anybody in the county at all. They closed all the roads. They didn't try to clear it up. There was less chance of *roads* than keeping the roads up.

Q. They had no trails for getting in?

A. The trails were all blown down. My men that went through had to cut their way through, to get through.

Q. It isn't the policy of the Forest Service to leave lands wholly without roads in—to go in and fight fires?      A. I don't know.

Q. You wish to tell this jury the way to reproduce forests is to leave it without roads?

A. That is my idea.

Q. That is the way you would do it?

A. Yes.

Q. No way to get into fight fire at all?

A. So there is no chance for fire to start.

Q. How many years in the particular area down there, will it be from the time that re-growth starts and until pulp from the hemlock on the area would be available for harvest?

A. On an average—that is a hard question to

(Testimony of Norman Porteous.)

answer, because you have got a factor coming in there of fire. Now, anything that I might say would assume that there would not be any fire on that second growth; that it was—nothing was going to interfere with the growth [236] I think that probably it would be to get enough that would make it commercially possible to go in and have men work and make wages, and not run all over the place, it would be about 40 years.

Q. 40 years? A. About 40 years.

Q. Do you know the operation that is going on now down on the Columbia River, on the north side of the River by the Longview Fiber Company where they are cutting second growth fir for pulp purposes? A. I don't know the operations.

Q. The redesign of the plant they made so they could log that in eight-foot logs, do you know how old the fir they are logging for pulp purposes is?

A. No.

Q. You don't know that?

A. I don't know it.

Q. It is necessary, isn't it, Mr. Porteous, in the proper administration of a re-growth forest to go in and thin the forest as it grows? A. No.

Q. It isn't necessary to thin it?

A. No, in this western country nature does that. The forest grows so thick. As it grows up the only way, as nature grows, it grows thick. As those trees grow up [237] those lower limbs are killed off, because they are so thick. As they get a little larger, certain trees die out. That is why we have the beau-

(Testimony of Norman Porteous.)

tiful clear timber in this western country. If you thinned it out, you would have Christmas trees. When the logs got big you would have what they call shallow veneer logs.

Q. Mr. Porteous, isn't it one of the accepted principles of administration of re-growth forests that when that forest reaches the age where the limbs have died off and grown over, that then you go in and cut out that tree that is eventually going to die, and when choked out, and that way save the nourishment in that forest for the tree that is going to grow to maturity? Isn't that one of the basic things in forestry? A. Not that I know of.

Q. Have you ever advised any one in connection with re-forestation?

A. No, I have advised them in connection with cut-over lands, not with re-forestation. I have nothing to do with reforestation. That is, artificial re-forestation.

Q. That practice is limited to getting the trees off and selling the logged-off lands? A. Yes.

Q. And you are not concerned over the second crop? [238]. A. No.

Q. Now, Mr. Porteous, it is true isn't it that the timber in the Olympic Forest, in the basin of the West Forks of the Humptulips, is the largest accessible stand of old growth timber available to the mills in Aberdeen and Hoquiam?

A. Well, that would depend on whether you decided that nothing in the Wynoochee Valley would come into Aberdeen and Hoquiam.

(Testimony of Norman Porteous.)

Q. And the Wynoochee now is going out to the north, to Puget Sound?

A. That is the way, except Schaffer Brothers are bringing it into Grays Harbor.

Q. And Schaffer Brothers are paying a dollar to go over the railroad of the Simpson Logging Company?

A. I wouldn't know about that. I just know the route of the logs.

Q. But, forgetting now the Wynoochee timber, with the possibility that might come—the timber in the Humptulips is the last available stand of sizeable proportion of old growth, isn't it?

A. Well, the old growth, the species is quite different than what Grays Harbor Mills are used to, because the species there are hemlock, and white fir, with some spruce. [239]

Q. And all of the mills are getting pretty used to change of species, aren't they, whether it is Grays Harbor, or Puget Sound or any where else, they are peeling fir logs, and hemlock logs, and white fir logs now, aren't they?

A. Yes, sir. They are learning how to do it.

Q. But that timber in all probability, over the next generation is going to be sold to loggers, and it is going to come out into the Grays Harbor market?

A. I don't think there is any doubt about that. That is the natural market for it.

Q. And the policy of the Forestry Service is to sell it in larger or smaller tracts to private loggers, and they take it out?      A. Yes, sir.

(Testimony of Norman Porteous.)

Q. And if, in October, 1943, you owned this logging railroad—this truck logging railroad that was then being used for that purpose, you would have been pretty satisfied as a business man that if persons acquiring timber to the north would bring that timber out over your logging road, wouldn't you, as long as you were reasonable in your charges?

Mr. Keenan: That is objected to Your Honor. That is injecting——

The Court: I think I would let him answer [240] the question.

A. That is the natural thing to hold that, and get all the traffic will bear.

Q. What the traffic would bear depends on what it would cost somebody else to build another road, wouldn't it?

Mr. Keenan: That is objected to, what the traffic would bear. That would include a lot of consideration, including a cost of condemning.

The Court: Proceed.

Q. You would reasonably expect, wouldn't you, Mr. Porteous, the timber immediately to the north, a dollar and a half a thousand would be a fair charge that you would have been able to obtain for moving it over your road?

Mr. Keenan: That is objected to.

The Court: Objection sustained.

Q. You say you would expect to get what the traffic would bear?           A. Yes.

Mr. Blair: I think that is all.